135-554

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 137.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LEWIS H. McDADE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 9, 1886.

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1 (Filed January 16, 1884. R. J. Meigs, clerk.)

In the Supreme Court of the District of Columbia.

LEWIS H. McDADE
against
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY. } No. 25023.

Declaration.

The plaintiff sues the defendant, for that the defendant is a corporation and owns and operates a horse railway in the city of Washington and District of Columbia and certain machinery for the construction and repairs of the tracks, cars, and other appliances and implements used in connection therewith; and heretofore, to wit, on on the 5th day of February, 1883, the plaintiff was in the employ of the defendant as a blacksmith, and was required by defendant from time to time to put and place a certain belt upon a pulley attached to a counter-shaft, when the same was in motion, to communicate power and motion from the machinery in the machine shop of the said defendant to the fan and drill-press used by plaintiff in defendant's blacksmith shop, and the said machinery and appliances were defective and dangerous, in that there was no loose pulley and lever or shifter to use for the purpose of putting said belt on and removing it from said first-named pulley; but plaintiff had no notice or knowledge, being unused to and unskilled in the said machinery and appliances and the use thereof, that the same were defective and dangerous to use, but the said defendant, its servants and agents, did know the same, but failed to notify plaintiff thereof; and on the said 5th day of February, 1883, the said plaintiff, while ignorant of
2 said defect and danger as aforesaid, was, at the defendant's request, engaged in the act of putting said belt on said first-named pulley, and by reason of said defect and dangerous condition of said machinery and appliances and without any fault or negligence on his part he was caught in or struck by said belt with great force and his left arm severed from his body thereby, by means of which he was made very sick, sore, and lame for a long space of time, and suffered great anguish, both of body and mind, and was crippled and permanently disabled for life from the performance of his usual trade and labor as a blacksmith, and he was put to great expense and trouble in trying to be healed and cured of said wound and sickness, and paid large sums of money for medical attendance, medicines, and nursing, to his damage the sum of twenty (20) thousand dollars.

Second count. The plaintiff also sues the defendant, for that the defendant was and is a corporation owning and operating a horse railroad, and in *its* connection therewith a machine shop for manufacturing and repairing machinery and appliances used therewith; and heretofore, to wit, on the 5th day of February, 1883,

while the plaintiff was in the employ of the defendant, attempting to operate some of its said machinery and appliances in or near said machine shop, which said machinery and appliances were defective and dangerous to the knowledge of said defendant, but which was unknown to said plaintiff, and while the said plaintiff was in the act of putting a belt upon a pulley, while the same was in motion, at the instance of said defendant, by reason of the negligence of the said defendant in permitting said machinery and appliances to be in a defective and dangerous condition without notice to plaintiff, and without any fault or negligence on the part of the plaintiff, he was violently struck by or caught in said belt with great force and his left arm severed from his body thereby, by means of which he was made very sick, sore, and lame for a long space of time, and suffered great anguish, both of body and mind, and was crippled and permanently disabled for life from the performance of his usual trade and labor as a blacksmith, and he was put to great expense and trouble in trying to be healed and cured of said wound
3 and sickness, and paid large sums of money for medical attendance, medicines, and nursing, to his damage the sum of twenty (20) thousand dollars.

Third count. The plaintiff also sues the defendant, for that the defendant is a corporation owning and operating a horse railroad in the said District of Columbia, and in connection therewith a machine shop, and near thereto a blacksmith shop, in which latter shop plaintiff was employed by defendant as a blacksmith; and heretofore, to wit, on the 5th day of February, 1883, while the plaintiff, at the instance and request of the defendant, was engaged in attempting to put or place a certain belt of the defendant's on a pulley, when in motion, to connect and communicate the power and force produced in the said machine shop to the fan and drill-press of the said blacksmith shop, said machinery and appliances being at the time unknown to plaintiff, but, with the knowledge and by the negligence of the defendant, defective and dangerous, in that there was no loose pulley and lever or shifter for the purpose of putting said belt on and removing it from said first-named pulley, the said plaintiff, because of the negligence of the defendant aforesaid and without any fault or negligence on his part, was caught in or struck by the said belt with great violence and his left arm severed from his body thereby, by means of which he was made very sick, sore, and lame for a long space of time, and suffered great anguish, both of body and mind, and was crippled and permanently disabled for life from the performance of his usual trade and labor as a blacksmith, and he was put to great expense and trouble in trying to be healed and cured of said wound and sickness, and paid large sums of money for medical attendance, medicines, and nursing, to his damage the sum of twenty (20) thousand dollars.

Fourth count. The plaintiff also sues the defendant, for that the defendant is the owner of a horse railroad and machine shop and blacksmith shop in the said District, and the plaintiff was employed as a blacksmith in the said blacksmith shop of the said defendant,

and had nothing to do with the said machine shop, and no
4 control over or duties to perform in or around said machine shop or the machinery therein situated, but the two shops and departments of labor were wholly separate and distinct from each other; and theretofore, to wit, on the 5th day of February, 1883, while the said plaintiff, at the instance and request of the defendant, was engaged in putting a certain belt of defendant's on a pulley, in motion, to communicate the power and motion from the machinery in the defendant's machine shop to the drill-press and fan in the said blacksmith shop, through the negligence of the defendant, its servants and agents, not in the same common work or employment with plaintiff, but in a different and distinct department of duty from him, in failing to keep said machinery and appliances in good and safe condition and repair, but permitting the same to be in a defective and dangerous condition, without notice to plaintiff, and in failing to slack the speed of said machinery while plaintiff was in the act of putting said belt on said pulley, as they notified him they would do, and should have done, and without any fault or negligence on his part, he, the said plaintiff, was caught in or struck by said belt with great violence and his left arm severed from his body thereby, by means of which he was very sick, sore, and lame for a long space of time, and suffered great anguish, both of body and mind, and was crippled and permanently disabled for life from the performance of his usual trade and labor as a blacksmith, and he was put to great expense and trouble in trying to be healed and cured of said wound and sickness, and paid large sums of money for medical attendance, medicines, and nursing, to his damage the sum of twenty (20) thousand dollars.

And the plaintiffs claims twenty thousand (20,000) dollars for the injuries hereinbefore complained of, besides the costs of this suit.

COOK & COLE,
Att'ys for Pl'ff.

(Filed January 16, 1884. R. J. Meigs, clerk.)

Notice to Plead.

The defendant is to plead hereto on or before the first special term of the court occurring twenty (20) days after service hereof; otherwise judgment.

COOK & COLE,
Att'ys for Pl'ff,
Per C. C. COLE.

5 *Summons. Issued January* 16, 1884.

In the Supreme Court of the District of Columbia, the 16th day of January, 1884.

LEWIS H. McDADE, Plaintiff,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, Defendant. } At Law. No. 25023.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

COOK & COLE, *Attorneys.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

Marshal's Return.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendants by service on Henry Hunt, their president, the 16th day of January, 1884.

CLAYTON McMICHAEL, *Marshal.*

6 *Plea. Filed Feb.* 1, 1884.

In the Supreme Court of the District of Columbia.

LEWIS H. McDADE
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY. } At Law. No. 25023.

And now comes the said defendant and, for plea to the declaration of the plaintiff in the above-entitled cause, says that it is not guilty in manner as alleged.

ENOCH TOTTEN,
Att'y for Def't.

Joinder of Issue. Filed Feb. 6, 1884.

In the Supreme Court of the District of Columbia.

LEWIS H. McDADE
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY. } No. 25023.

The plaintiff joins issue on the defendant's plea.

COOK & COLE,
Att'ys for Pl'ff.

Notice of Trial.

Enoch Totten, Esq., att'y for def't:

Take notice that the issue above joined will be tried
7 at the next term of the court.

COOK & COLE,
Att'ys for Pl't'ff.

Rec'd copy of the above this 6th day of February, 1884.

ENOCH TOTTEN,
Att'y for Def't.

Note of Issue. Filed Feb. 6, 1884.

In the Supreme Court of the District of Columbia.

LEWIS H. McDADE
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY. } No. 25023.

Attorneys for plaintiff, Cook & Cole; attorney for defendant, Enoch Totten.

Date of last pleading, Feb'y 6th, 1884.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term at law and circuit court in and for said District and designated by order passed in general term, September 25th, A. D. 1885, as division No. 1, commencing on the third Monday, it being the nineteenth day, of October, A. D. 1885.

MONDAY, *October 19th, A. D.* 1885.

By order of Walter S. Cox, one of the justices of said court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

8 THURSDAY, *December* 10*th*, *A. D.* 1885.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

LEWIS H. MCDADE, Plaintiff,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, Defendant. } At Law. No. 25023, Cal. 347.

Now come here as well the plaintiff, by his attorneys, Messrs. Cook & Cole, as the defendant, by its attorney, Mr. Totten, and a jury of good and lawful men of the District, to wit, J. McHenry Hollingsworth, Bartley Taylor, Lawrence Hickey, Jasper M. Jackson, Robert F. Mattingly, Theodore C. Barber, Paul D. Connor, John W. Dyer, William R. Keyworth, John H. Ferguson, Albert G. Hall, and Thomas Joyce, who, being duly sworn to try the issue above joined, after a partial hearing of the case are respited until the meeting of the court to-morrow morning.

FRIDAY, *December* 11*th*, *A. D.* 1885.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

LEWIS MCDADE, Pl't'ff,
vs.
THE WASHINGTON & GEORGETOWN R. R. Co., Def't. } At Law. No. 25023, Cal. 347.

9 Now again come here the parties aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court on Monday morning next.

MONDAY, *December* 14*th*, *A. D.* 1885.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

LEWIS H. MCDADE, Pl't'ff,
vs.
THE WASHINGTON AND GEO'T'N R. R. Co., Def't. } At Law. No. 25023, Cal. 347.

Now again come here the parties aforesaid and the same jury that was respited on Friday last, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

THURSDAY, *December* 15*th*, *A. D.* 1885.

Session resumed pursuant to adjournment, Cox, justice, presiding.

LEWIS H. McDADE, Pl'ff,
vs.
THE WASHINGTON & GEO'TOWN R. R. Co., Def't. } At Law. No. 25023, Cal. 347.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the hearing of the case, are again respited until the meeting of the court to-morrow morning.

10 MONDAY, *December* 16*th*, *A. D.* 1885.

Session resumed pursuant to adjournment, Cox, justice, presiding.

LEWIS H. McDADE, Pl't'ff,
vs.
THE WASHINGTON & GEO'TOWN R. R. Co., Def't. } Law. No. 25023, Cal. 347.

Now again come here the parties aforesaid and the same jury that was respited yesterday, who, after further hearing of the case, are again respited until the meeting of the court to-morrow morning.

THURSDAY, *December* 17*th*, *A. D.* 1885.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

LEWIS H. McDADE
vs.
THE WASHINGTON & GEO'TOWN R. R. Co., Def't. } Law. No. 25023, Cal. 347.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

FRIDAY, *December* 18*th*, *A. D.* 1885.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

11 LEWIS H. McDADE, Pl't'ff,
vs.
WASHINGTON & GEO'TOWN R. R. Co., Def't. } At Law. No. 25023, Cal. 347.

Now again come here the parties aforesaid and the same jury that was respited yesterday, who, after the case was given them in

charge, on their oath say they find said issue in favor of the plaintiff, and assess his damages by reason of the premises at six thousand one hundred and ninety-five dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant six thousand one hundred and ninety-five dollars for his damages, in manner and form as aforesaid assessed, and $—— for his costs of suit, and have execution thereof.

Motion for a New Trial. Filed Dec. 29, 1885.

In the Supreme Court of the District of Columbia.

LEWIS H. MCDADE, Plaintiff,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, Defendant. } At Law. No. 25023.

And now comes the said defendant and moves the court for a new trial on exceptions.

ENOCH TOTTEN,
Att'y for Defendant.

Undertaking on the above appeal by way of supersedeas is hereby waived.

COOK & COLE,
Attorneys for Pl't'ff,
Per C. C. COLE.

12 *Motion for a New Trial. Filed Jan.* 22, 1886.

In the Supreme Court of the District of Columbia.

LEWIS MCDADE
vs.
WASHINGTON AND GEORGETOWN RAILROAD COMPANY. } At Law. No. 25023.

And now comes the said defendant at this term and moves the court to set aside the verdict herein and grant a new trial on a case for insufficient evidence and for excessive damages.

ENOCH TOTTEN,
For Defendant.

Order of [*for*] *Extending Term for* 10 *Days. Filed May* 8, 1886.

Supreme Court, Dis. of Columbia.

LEWIS H. MCDADE
vs.
THE WASH'N & GEORGETOWN RAILROAD COMPANY. } Law. No. 25023.

The exceptions in the above cause of the defendant having been tendered by the defendant's counsel to the counsel for the plaintiff,

and said counsel having failed to agree and settle the same, it is, this 8th day of May, 1886, ordered that the term of this court at which the above cause was tried be, and it hereby is, further extended for the period of ten (10) days from this date for the purpose of settling such exceptions.

W. S. COX, *J.*

13 (Filed May 18, 1886. R. J. Meigs, clerk.)

In the Supreme Court of the District of Columbia.

LEWIS H. MCDADE
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY. } Law. No. 25023.

Exceptions.

I.

Be it remembered that upon the trial of the above-entitled cause the plaintiff, to maintain the issue upon his part joined, testified that at the time of the injury in the declaration alleged—that is, on the 5th of February, 1883—he was in the employ of the defendant, at its shops, in Georgetown, D. C., as a blacksmith, and had been so employed for about two years prior to said injury; that shortly before he was employed by the defendant a man by the name of Eckrit, then and afterwards in the employ of the defendant as a blacksmith, came to the plaintiff and told him that Mr. Hurt, the president of the defendant, wished to employ him as a blacksmith, and to report for duty on the Monday following, being the 1st of April or May, 1881; that plaintiff, on said day, reported to Samuel Hawk, the foreman of the defendant, who asked
14 what wages plaintiff wanted, to which plaintiff replied that he would expect the highest price paid by the defendant to any employee in the line of work of plaintiff, and then told plaintiff to go to work; that plaintiff then went to work and was paid at first at the rate of $13.50 per week, and afterwards at the rate of $15 per week; that there never was any other contract between plaintiff and defendant; that when plaintiff reported for duty he found Eckrit in the blacksmith shop employed as a blacksmith; that the plaintiff and Eckrit made and repaired the irons used in and about the manufacture and repair of cars; that they worked in the same room, being the blacksmith shop, at the same forge but different fires, from the time plaintiff went into the service of the defendant until Eckrit left, which was from four to six months after plaintiff was employed; that another man, named Morgan, worked at a separate forge in the same room or shop, which was about forty feet square, at making horseshoe nails; that the plaintiff, Eckrit, and Morgan were the only persons employed in the blacksmith shop, except a man named Parsons, since deceased, who was em-

ployed as an assistant to the plaintiff after Eckrit left; that the blast of air used at the forges was supplied by a fan propelled by an engine which ran all the machinery in the shops and mill of the defendant; that said engine was in the room adjoining that where the plaintiff was employed, with a partition wall between the two rooms and a door in the wall, through which persons passed from one room to the other; that there was a counter-shaft in the blacksmith shop, to which motion was communicated from the main shaft in the engine-room by a belt running on a pulley fixed to the main shaft and passing through openings about eighteen inches square in the partition wall, and then running on another pulley fixed on the counter-shaft; that motion was communicated to the fan which furnished the blast for the forges by a belt running on a fixed pulley on the counter-shaft and on a fixed pulley attached to the fan, the latter pulley being on the floor under the former and many times smaller; that the former pulley, that on the counter-shaft, was about thirty inches in diameter; that the fan was enclosed in an iron case, and the current or blast of air was conducted by a pipe passing underground to forge; that there was in the pipe, near the forge, a valve to shut off or turn on the blast at pleasure; that the same fan furnished the blast for the fires at the forge where the plaintiff and Eckrit worked; that there was another fan which supplied the blast for the forge used by Morgan, which was run by means of another belt running from a fixed pulley at that fan to another fixed pulley on the counter-shaft above mentioned and immediately above; that there was also in the blacksmith shop a drill-press, run by another belt running from the drill-press to another fixed pulley on the said counter-shaft; that frequently the defendant had occasion to run the engine and a portion of the machinery in the shops in the evening or night after work in the blacksmith shop had ceased for the day, and when this was the case the belt which propelled the fan supplying the blast for the forge where the plaintiff worked was, by direction of defendant, then thrown off the pulley fixed on the counter-shaft, so as to save the wear and tear of thus running the fan when not needed; that such occasions happened three or four times a week, and sometimes once a week; sometimes not once a week; perhaps, on an average, once a week; that on such occasions sometimes plaintiff threw off the belt, but it was generally done by some one else in the employ of defendant; that on such occasions the belt would be thrown off the pulley of the counter-shaft, but would not be taken off the small pulley at the fan, which pulley had iron guards on each side; that before Eckrit left and during the time when he and plaintiff were both in the blacksmith shop Eckrit always put the belt on when it had been taken off, except when the belt had been taken off for repairs, and that when repairs were needed the belt would be taken off and put on again by Lewis Moore, the miller in the employ of the defendant, who attended to grinding feed for horses, whose duty it was to attend to all repairs of the different belts in the shop; that when Eckrit left the plaintiff was directed to take the place or fire of Eckrit at the forge by Hawk, the foreman, and did so; that after Eckrit left the plaintiff, all the time

until the injury—a period of sixteen or eighteen months—
16 habitually put on the belt, except when it was taken off for repairs; that the plaintiff has seen Kline put on his belt, and also that of Morgan; that plaintiff, after Eckrit left, put on the belt because he saw Eckrit do it, and had no recollection of being told to put it on, except that Mr. Kline, the first time the belt was off after Eckrit left, and when his attention was called by the plaintiff to the fact that the belt was off, said, "Can't you put it on?" in reply to which the plaintiff said, "I suppose so," and then put the belt on, and afterwards continued habitually to put it on whenever he found it off, except when taken off for repairs, when it was put on after repairs by Moore; that Hawk was the general foreman or superintendent of all the shops, including the blacksmith shop, and had charge of all the machinery as was known to the plaintiff; that plaintiff took his orders and directions from Hawk, but Hawk never gave plaintiff any instructions as to what he should do, except he should take Eckrit's place, as above mentioned; that plaintiff also knew that Moore had charge of the repairing of the belts, but never was informed that it was Moore's duty to put on belts except when taken off by him for repairs; and when plaintiff's belt had to be repaired or tightened he sent for Moore, who did the necessary work; that Hawk had seen plaintiff put on the belt, as had also Saylor, the superintendent of the company, but that neither had ever given the plaintiff any instructions about the belt or told him to send for Moore when the belt was to be put on, or told him, plaintiff, not to put the belt on; Moore never put it on except when he repaired it; that plaintiff was fifty-three years old and had followed the business of a blacksmith in Washington and Baltimore since he was seventeen, where he learned the trade, but had no experience with machinery or belts and did not know until he was hurt, as complained of, that it was dangerous to put on the belt, and that he had never before been employed in a shop where the blast of air for the forge was created by machinery but once, and in that instance the fan was two hundred feet off, and not in the shop, and he had nothing to do with it; that the belt connected with the fan that supplied the air to the plaintiff's forge was the only
belt he ever put on; that he never put on the belt for
17 the drill-press or the forge at which Morgan worked; that his occupation was distinct from that of Morgan, and neither had anything in connection with or control over the other; that the pulley on which ran the belt for the plaintiff's forge was about twelve feet above the floor, and in order to put the belt on it was necessary to use a ladder ten or twelve feet long placed against the partition wall, and when he went up the ladder his back might have touched the shaft, and the face of the pulley was nearer the wall than his face; when he tried to put on belt he turned his face round, putting on belt when injured as he had always done; that the ladder was not stationary which was there when he was employed and remained while he did, and that the counter-shaft was about thirty inches from said wall, and the pulley for plaintiff's forge was about fifteen inches from the wall, and the counter-shaft was about three

and one-half or four inches in diameter; that the said pulley was fastened to the counter-shaft by a set-screw running through the hub of the pulley to the counter-shaft, and the head projected about an inch and a half above the hub; that the plaintiff had repeatedly observed the said set-screw before the injury; that the engine was in the adjoining room and about twenty feet from plaintiff's forge; that the engineer was Peter Kline, whose duty was to attend to and run the engine and who had no fireman or other assistant; that the said engineer had no authority in respect to the plaintiff, as the plaintiff had none in respect to the said Kline; that on the 5th of February, 1883, when plaintiff went to the shop to commence work, at a few minutes before 7 a. m., Kline was in the engine-room and Parsons in the blacksmith shop; that plaintiff found the belt which turned the fan supplying air to his forge off the pulley, and the machinery in motion; that he went up the ladder to put the belt on and made the attempt, but the belt immediately came off; that he then came down the ladder and went into the engine-room and told Kline that there was something wrong with the belt and it would not stay on; that Kline thereupon came into the blacksmith shop and went up the ladder and put the belt on, but it immediately came off, as before; that Kline then came down
18 the ladder and told the plaintiff that he, Kline, would go and slow up the engine, and that the plaintiff should then put on the belt; that plaintiff after waiting a sufficient time, as plaintiff supposed, for Kline to reach the engine and slow it up, and after the pulley, which had been rapidly revolving, had slacked somewhat, again went up the ladder and put the belt on the pulley in the way he had usually done before, but the belt was thrown off towards and against the plaintiff and formed a loop which caught the set-screw and wound around the counter-shaft, and drew the left arm of the plaintiff in betwen the belt and the counter-shaft, crushing and tearing said left arm to such an extent that it was at once necessary to amputate it near the shoulder; that when plaintiff was caught in the belt, as above mentioned, he cried out, and the engineer then stopped the engine; that the accident occurred on Monday morning, and on the previous Friday or Saturday, the belt being out of repair, Moore came and repaired it, and in a short time replaced it on the pulley on the same day, and that it worked all right afterwards, and was still on the pulley when he left Saturday afternoon.

The plaintiff further testified that he had suffered great pain, both of body and mind, from the accident, and was confined to his room for six weeks, and most of that time to his bed; that his nervous system was greatly shocked, and that for eighteen months after the accident he was unable to do any work, and that since that time, although better and stronger, he has suffered considerably, and is permanently disabled from working at his trade.

The plaintiff further testified that he never had any experience with machinery, and had no knowledge that it was dangerous to put a belt on a pulley while in motion more than it was to strike a piece of iron with a hammer; that neither Hawk, Saylor, or any one

else told or informed him that it was dangerous to do so; that whenever he saw Eckrit, Kline, Moore, or others put on the belts they did it while the machinery was in motion; that if he had known it was dangerous to do so he would not have put the belt on;
19 that he never saw any one put a belt on a pulley until he saw it done at defendant's shops; that the defendant had the loose pulley for the purpose of shifting belts and stopping machinery in other parts of its shops before and at the time of the injury to the plaintiff, but he did not know that until after he was injured; that there were no loose pulleys in the blacksmith shop while plaintiff was there, and he had never seen one prior to his injury and did not know there was such a thing, but learned after he was injured that they were then in use in other parts of defendant's shops; that he first saw one at Springman's blacksmith shop, in Washington, after he was injured.

That on cross-examination he said that on the occasion of his injury, when Kline left him to go to the engine-room, he said he would go and slow up the engine, not stop it, and for plaintiff to put on the belt; that he stood at the foot of the ladder for about a minute after Kline left him, and until the speed of the machinery was somewhat slackened, and then went up the ladder, which took him about half a minute, and attempted to put on the belt; that when he was caught in the belt he screamed, and Kline came to the door of the blacksmith shop and then went back and stopped the engine.

Dr. Ritchie was called in for the plaintiff and testified that he attended the plaintiff when he was injured and amputated his arm; that his suffering was acute and the shock great; that there was great and permanent nervous impairment and mental depression and permanent physical injury.

John T. Springman was then called for the plaintiff, and testified that about a year and a half ago, having occasion to do some very heavy work at his foundry, he bought a large blower and supplied the air by means of a fan propelled by machinery; that he had placed at the fan a loose pulley and another on the counter-shaft, both next to the fixed pulleys, and that the belt was shifted, when necessary, from the fixed to the loose pulleys by means of a lever near the floor; that the said contrivance was suggested by a machinest employed by him, and that witness, who had followed the
20 trade of a blacksmith for twenty-five years, never saw such a contrivance anywhere else; that such a contrivance for shifting belts and stopping machinery was considered safe, but to put them off and on by hand was considered dangerous.

The plaintiff then called as a witness Robert Thompson, who testified that he was by trade a carpenter, and had been working for twenty-five years in planing mills and sash factories and had large experience in machinery and belting, and that loose pulleys for the purpose of placing and removing belts on and off fixed pulleys had been in common and general use for more than twenty-five (25) years; that they can be used wherever there is room to place them; that he has a fast and loose pulley right at the floor on a machine

in his shops in this city; that it is more common to have the loose pulley on the counter-shaft immediately adjoining the fast pulley and the pulley at the machine as wide as both the fast and loose pulley; that the belt is removed from the fast to the loose pulley and back again by means of a lever called a shifter, which can be easily operated by one hand very quickly and without any danger; that by means of the loose pulley any particular machine may be stopped and started at pleasure while the motive power and other parts of the machinery are still in motion; that the loose pulley and shifter are used both for convenience and safety; that it is dangerous to put belts onto moving pulleys by hand, and he would not do it except by use of the loose pulley and shifter; that if they are used there is perfect safety.

The plaintiff then called Smith Pettit as a witness, who testified that he had been a machinist for thirty years and was carrying on boiler and foundry work; that he had blacksmith forges for which the blast was supplied by a fan; that he had another fan for foundry purposes; that as to the fan used for the forge there was a loose pulley on the counter-shaft next to the fixed pulley; that as to the fan for foundry purposes there was no loose pulley, the belt having to be removed very seldom; that he never saw more than one machine propelled with the same counter-shaft when properly constructed; that the method of putting belts on and off with loose and fast pulleys for the purpose of starting and stopping machinery
21 had been in common and general use for more than thirty (30) years; that it was necessary for both convenience and safety; that it was very dangerous for any person, and more especially one not accustomed to it, to put belts onto moving pulleys by hand.

The plaintiff then called Robert B. Randolph as a witness, who testified that he was the machinist at the State, War, and Navy Department, and had been for a number of years, and had had other experience; that tight and loose pulleys can and should be used on all machines; that there is always danger in putting on a belt by hand, and a shifter ought to be used when a belt is to be moved, and that the shifter is in general use; that they are used in the Government Printing Office, at the navy yard, in private establishments in Washington, and, indeed, in all well-regulated machine shops, here and elsewhere, which had come under his observation; that he regarded them as indispensable in order to avoid danger in putting on belts; that the arrangement of the fast and loose pulley is not expensive.

The plaintiff then called John W. Eckrit as a witness, who testified that he knew plaintiff and had worked with him three months at the blacksmith shop of the defendant; that the blast of air for the forge was supplied by the fan propelled by machinery, as already testified to; that in addition to the fan there were bellows attached to the forge for supplying air in case of any accident; that whilst in the employ of the defendant he put on the belt; that after plaintiff came he, Eckrit, put it on perhaps two, three, or four times; that no one directed him to put on the belt, and he did not know that the

foreman, Hawk, was aware that witness put on the belt, and that he had put on belts before he was employed by defendant.

Thereupon the plaintiff rested his case. The defendant then moved the court to instruct the jury that upon the aforesaid evidence the plaintiff was not entitled to recover, but the jury must find a verdict for the defendant; which motion was overruled by the court upon the ground that there was evidence tending to prove that the process of putting on the belt by hand was dangerous,
22 and that the defendant had failed to apprise the plaintiff of such danger; and to the overruling of said motion the defendant, by its counsel, excepted and prayed the court to sign and seal this its first bill of exceptions, which is accordingly done this 18th day of May, A. D. 1886.

WALTER S. COX, *A. J.* [SEAL.]

II.

After the evidence contained in the foregoing bill of exceptions, which is made a part hereof, the defendant gave evidence tending to prove that the car shops in question were erected by the defendant in the year 1879 for the purpose of building and repairing cars and for other work connected with the horse railroad of the defendant; that the machinery in the said shops, including the blacksmith shop, was of the most approved character and purchased without regard to cost, and such as was generally in use in such establishments; that machinery better adapted to such shops and more suitable for such works could not be found in the country; that loose pulleys and a shifter, or lever for shifting the belt, were not used in blacksmith shops like that of the defendant; that likewise a separate counter-shaft for each fan was not used; that the belt in question was only between three and four inches wide and could readily and without danger be by hand thrown off and put on by a person of ordinary intelligence who had been in the shop a few weeks and had seen the operation a few times; that loose pulleys and a shifter were used when the machine required the power to be quickly thrown off or put on, or the work to be done was very heavy and the belt not easily managed by hand; that there was a loose pulley on the drill-press in the blacksmith shop; that the set-screw on the hub of this pulley was similar to all others, and projected so as to allow it to be easily got at; that the foreman of the defendant over the plaintiff was Lewis F. Hawk, a carpenter by trade, and who worked in the car shops, and was in all respects competent to act as foreman; that said foreman had charge of the men in the blacksmith shop, the engineer, the miller,
23 and the men in the car shop and harness shop—fifteen or sixteen in number in all; that all of these men, including the plaintiff, were subject to the authority of the foreman and took orders and directions from him alone; that the engineer, Peter Kline, had nothing to do with the belts nor had he any duties beyond the engine-room, where it was his duty to fire the engine and manage and

run it, and that if he ever took off or put on belts it was without authority and was known to be so to the plaintiff and other employees; that the miller of the establishment, Edwin Moore, who had had an experience with belts of more than twenty years and was in all respects skillful and competent, was specially charged with the duty of attending to and repairing and taking off and putting on the belts connected with the machinery; that his duty was not confined to repairing and taking off belts for the purpose of repair and then putting them on, as testified to by the plaintiff, but that he had charge generally of the belts, as was known alike to the plaintiff and other employees; that Morgan, who worked in the same shop with plaintiff, always called on Moore to put on his belt, and that on several occasions, the last in January before the accident, the plaintiff did the same thing; that Mook, the predecessor of the plaintiff, always called on Moore to fix the belt. Hawk, who was foreman of defendant's shop, testifies in effect as follows: That on Saturday before, at about four, when work in the blacksmith shop was about to stop, the foreman went to the blacksmith shop and found there the plaintiff and his helper, Parsons, since deceased, and, addressing them both, said that the engine would run after working hours and the belt would be thrown off, and that on Monday Moore should be called when the bell rang to put on the belt; that the foreman was induced to give these directions because he knew that on Friday, the day before, the belt had been taken off and repaired by Moore; that the plaintiff and Parsons were within twenty-five feet of the foreman when he gave the directions, and must have heard them, he thought, but that the noise of the machinery was going on at the same time and neither of them made any response; that he was a carpenter and not a machinist, and never had any experience
24 with machinery and no special knowledge of it; that the belt was not off more than twelve (12) or fifteen (15) times while plaintiff was there; that Moore had charge of the belting; that on Friday preceding the accident he sent for Moore because he had, as was his duty, repaired the belt or cut it, and it turned out to be a little too tight; that he saw plaintiff at work after he was employed, but never gave him any instructions; that he understood that if the belt in being repaired is tightened too much its tendency will be to fly off, if the motion of the wheel exceeds that of the hand in putting it on.

GEORGE E. NOYES, a witness on behalf of defendant and a machinist of experience, and the only machinist examined on behalf of defendants, except one Middleton, testified to the effect as follows: That he had never examined the machinery in defendant's shops, except standing on the floor of the machine shop; that the general plan seemed to be good; that if it was necessary to stop the machinery or any part of it periodically a counter-shaft and loose pulley for each machine would be necessary; that sometimes fast and loose pulleys are connected with forges and sometimes not; that he has fast and loose pulleys in his blacksmith shop and the belt is moved by a stick; the fast and loose pulleys are generally used when it is

necessary to stop the fan periodically; that when the machine is to run all the time the fast and loose pulley are not necessary; that no one who understands it likes to handle the belt, and it should be avoided as much as possible, and the only preventive is a loose pulley. It is always dangerous to put on a belt by hand when in motion; if the pulley is still it is very difficult to put the belt on by hand; there should be motion; and that he usually had boys in his shop to put belts on the pulleys by hand without a shifter, and thought that an ordinarily bright boy could learn to put on such a belt in a day, and by being shown how to do it two or three times.

EDWIN MOORE, a witness produced on behalf of the defendant, being first duly sworn according to law, was examined, and testified as follows:

25 Direct-examination.

By Mr. TOTTEN:

Question. Where do you reside?
Answer. In Georgetown.
Q. In what business are you engaged?
A. As a miller.
Q. Where?
A. At the Washington & Georgetown Railroad Company's shop.
Q. How long have you been employed in that shop?
A. I came over to the Washington & Georgetown Railroad building on the 23d day of May, 1879, and I have been there ever since.
Q. What is your business there now?
A. Grinding corn for horses.
Q. Attending to the belting, also, about the mill?
A. Yes, sir.
Q. Was that your business from the time you went there until the present time?
A. It was, sir.
Q. How many years have you been in that business?
A. Well, ever since 1856.
Q. Does the business require skill in the matter of putting on belts—repairing belts?
A. Well, there are some people about the belts who are very clumsy, more clumsy than others. It don't require a great deal of skill, only I could put the belts on quicker than anybody else there.
Q. Does the business of a miller require that experience? Don't they have to do it?
A. Yes, sir.
Q. Belting is used in all the mills?
A. Yes, sir.
Q. Grist-mills, I believe you call them?
A. I used mostly to be at work in merchant mills.
Q. How many years have you been in the habit of putting on belts—repairing belts?
A. Ever since I have been in the milling business, since 1856.

Q. Is there anybody else connected with the shops of the company who is charged with the duty of putting on belts and repairing them?

A. Only myself.

26 Q. You are the only man?

A. Yes, sir.

Q. Do you put belts on?

A. Yes, sir; when called upon.

Q. And repair them?

A. Yes, sir.

Q. I want you to tell the jury as to the large belt used in the company's shops, and also as to the smaller one?

A. The belt in the engine-room is a sixteen-inch. I generally put clamps on that to draw each end, because it is a hard matter to get it to. It is hard to put it on without clamps, to get it tight enough.

Q. The large belts you repair off the pulleys?

A. Yes, sir.

Q. What is the *modus operandi* of repairing smaller belts, like the one in question? I ask you what is usually the mode of repairing smaller belts?

A. Smaller belts are very light and they can be repaired very quickly, and don't require the clamp to draw them together because they are very frail, and they are of good weight, and you can go anywhere and slide them on very quick. You can take them off the pulley very easily, get them in the right position, and put them on.

Q. I am not asking you about putting them on; I mean repairing them. Do you repair them on the pulley or off the pulley?

A. Off the pulley.

Q. And when you get through repairing them you put them on again?

A. Yes, sir.

Q. How long does it take you to sew or lace a pulley three inches in width?

A. About five or six or seven minutes.

Q. Any longer than that?

A. No, sir.

Q. Where do the belts wear out the soonest?

A. Generally at the lacing; it wears more rapidly out there than at any other place; and it makes a drag as it wears against the pulley and hugs it.

Q. How many sets of laces will one belt usually wear out?

27 A. It is according to how tight the belt is. An ordinary one would wear out about fifty, I think.

Q. Are you acquainted with the belting by which the plaintiff was injured?

A. Yes, sir.

Q. Was that a good, bad, or indifferent belting?

A. It was a first-class belt.

Q. Is it in order now?

A. Yes, sir; it is in good order. It has become stretched and thinner in thickness.

Q. When it stretches you repair it by taking out a piece?

A. Yes, sir; by taking out and sewing it all together with lacing?

Q. Do you remember repairing this belt previous to the accident—immediately previous?

A. Yes, sir.

Q. Can you tell the jury on what day it was?

A. I think it was on Friday.

Q. What did you do to it?

A. I took out a small piece and put it back on the pulley while it was in full motion.

Q. Are you a skillful man in putting on belts?

A. I do not like to praise myself; I think I am as good as the common run of skillful men.

Q. At that business?

A. Yes, sir; I have had a great deal of experience at it, handling a great many belts.

Q. You have put on a great many belts?

A. Yes sir.

Q. Do you require the engine to be slowed when you put the belting on?

A. If a small belt, no; but, of course, if it is a big belt, I cannot lift the weight, get it and hold it, for it is up high.

Q. You can put small belts on when the pulley is in full motion, as you have stated?

A. I have often.

Q. You can do it without any trouble?

A. Yes, sir.

Q. And without the apprehension of any danger?

A. I do not apprehend any danger.

Q. Why?

A. Because I am accustomed to it and do not fear any.

Q. Can you give the jury an idea of the time required for
28 a man of ordinary intelligence to become skillful in putting belts on—smaller belts?

A. No, sir; I do not think that it requires any great skill. Some men are more apt than others. Some are more apt to notice what position to hold the belt. A man going up to throw it on, I should think he could put it in proper position without any trouble.

Q. Did McDade ever send for you to put his belt on?

A. Yes, sir.

Q. Can you state when?

A. He sent a man by the name of Parsons, his helper. He came after me to come down about his belt, I think, in January, on a Monday morning, I think.

Q. January previous to the accident?

A. Yes, sir.

Q. Was McDade in there?

A. Yes, sir; He was there.

Q. Did you have any conversation with him about it?

A. No, sir; I went there and put the belting on and then went back to the balance of my duties.

Q. The balance of your business?

A. Yes, sir.

Q. How often did he send for you?

A. Well, I remember his sending for me at that time when the belt was off and didn't require any fixing. He sent a great many times, I could not tell you how many—seven or eight or a dozen times—to mend his belt or take a piece out and put it into position, that would make it do good work.

Q. Did you ever put the other belts in that blacksmith shop on?

A. Yes, sir; I have put Mr. Morgan's on often, and looked upon it as my duty to put it on when called upon.

Q. Was Mr. Morgan's blower the same as the other blacksmith's?

A. Yes, sir.

Q. Can you tell the jury how often during the sixteen or eighteen months prior to the accident this belt got out of way?

A. I could not say positively, but I will say seven or eight or ten times, probably. On one occasion, during the summer pre-
29 vious to this accident, he remarked to me, he says, "Why, you put that on very easily."

Q. McDade said that to you?

A. Yes, sir.

Q. When did you say that was?

A. It was in the summer previous to the accident. I remember it was warm weather.

Q. Since 1879 has there been at any time any other man whose business it was to put the belts on?

A. No, sir.

Q. No other man besides yourself?

A. No, sir; unless Mr. Kline put it on.

Q. I am speaking about duty. Whose duty was it?

A. My duty.

Cross-examination.

By Mr. Cook:

Q. You have said it was the business of a miller to adjust belts; is that so?

A. Well, it has been so ever since I have been in the business, wherever I worked.

Q. Wherever you have been working in a mill and didn't do your duties it was your business to manage the belts?

A. Yes, sir.

Q. And repair them?

A. Yes, sir.

Q. You say that Friday you repaired this belt by taking out a piece?

A. Yes, sir.

Q. And you then put it on while in full motion?

A. Yes, sir.

Q. Who was present when you did that?

A. Mr. McDade and some other persons were present.

Q. If I understand you correctly, you don't regard the full motion as objectionable in placing on the belt?

A. Not with myself; no, sir.

Q. Not with yourself?

A. No, sir.

Q. Would it be with others?

A. Probably it might be with a man who was awkward. I say a very small belt. You could not put on a big one. If he was anyways awkward when it was in quick motion he could not put on one.

30 Q. What was your instructions, and from whom did you get them, if anybody, with regard to belts in this machine shop?

A. Mr. Hurt told me that I had charge of all the belting about the mill, sir, and then I received orders from Mr. Hawk to put on belts, and received orders from Mr. McDade to put on his belt.

Q. Those were belts that were out of order, that had been out of order?

A. Yes, sir.

Q. Those were belts that were out of order and required repair?

A. Yes, sir; and on two occasions they did not want any repair. Parsons on one occasion, and Mr. McDade on another, told me to put it on, as I passed through the room one winter morning.

Q. As you passed through the engine-room, on one occasion Parsons, and on another McDade, requested you to put it on?

Mr. DAVIDGE: And then the belting had not been repaired?

Q. You were requested to do it because you passed through?

A. If you will allow me, I will tell you plainly. Every winter I wear clothes that become very dusty and mealy, and I generally go there in the morning, carry them and put them over the pipes in the paint shop to get warm, to get to blood heat, as my blood is thin. There was no steam that morning in the paint shop, and I had on my dirty clothes, and went into the engine-room, and while I was passing it Mr. McDade asked me to put the belt on, while I was going upstairs, and I did so; that was in December prior to the accident.

Q. The only occasion, as I understand you, is when you were down there, no matter for what purpose, you were requested to put it on by Parsons?

A. Yes, sir; that was besides the time he came after me one Monday morning. That was in January, and he asked me if I would go down and put the belt on. I went down and put it on. Mr. McDade was present and Mr. Parsons.

Q. On these two occasions no repairs were required to
31 the belting?

A. No, sir.

Q. But on the other occasions repairs were required?

A. Yes, sir.

Q. When repairs were required were you sent for?
A. Yes, sir; invariably.
Q. At different times?
A. Yes, sir.
Q. And you would respond?
A. Yes, sir.
Q. To make the repairs?
A. Yes, sir.
Q. McDade also sent for you on several occasions?
A. Yes, sir.
Q. And you have responded, repaired the belting and placed the belts on? When the belts were let loose and required no repairing were you always called upon to place them on the pulleys?
A. I think I can say that the only occasion I went down knowing the belt was off I went into Mr. Kline's room, and I remarked to Mr. Kline, "Who put that belt on?" and he said, "I did," and I never gave it any more thought afterward.
Q. And the chief occasions on which you replaced the belts was when they were out of order and required repairing?
A. Well, I put them on on all occasions, when they did not require any repair, when I was called upon.
Q. If called upon. But the occasions that you were called upon from time to time in the workshops of the company was when the belts would get out of order, and then there was a call upon you to put them in order and replace them?
A. Yes; and I done so.
Q. But when they were not out of order and they were placed off by anybody, were you always sent for to put them on?
A. Well, they might have been placed on by some one. As I remarked, on one occasion I went down to see——

Mr. COOK: Never mind.
Mr. DAVIDGE: Let him go on.
Mr. COOK: He has given us that one occasion, but go on and say what you want to.

32 A. I say I went through the engine-room, knowing that the belt had been off and didn't require repair, and I saw it running, in motion. I remarked to Mr. Kline, "Who put that belt on?" and he says, "I did," and I never gave it any thought.
Q. You told us that before?
A. Yes, sir.
Q. Now, when the belts when [were] not injured and didn't require repair, and were simply placed off temporarily for the purpose of work and — save power and avoid injury, who would assist in replacing them? That would not require any operation that necessitated your being sent for?
A. No, sir; I think not; I might have been sent for. I know on one occasion I remember——

Mr. COOK: I think you have already told us that.
Mr. DAVIDGE: I think we are entitled to have his answer. I do not know what the witness is going to say.

A. The only occasion I noticed the belt being off was when I passed through the engine-room; and, knowing that the belt had been off, I asked Mr. Kline who put it off——

Mr. Cook: That will do. As a matter of fact, do you not know that the common and ordinary practice was, when there was no injury to the belts, for them to be placed in position by other parties than yourself when you were not called on?

A. Only Mr. Kline.

Q. That is the only exception that you know of?

A. Yes, sir.

Q. That is, if any had been off on other occasions, when they required no repair, and were put on by any person—by Mr. McDade, by Kline, or by anybody else—you were ignorant of it?

A. I never knew of it, and I never knew of Mr. McDade putting on any belt.

Q. If you were not present and did not see it, of course you were ignorant of it?

A. I never knew that he put on any belt until after the accident.

Q. Did you go around when the belts were taken off for any reason so as to see if they were replaced?

33 A. Well, I cannot say I remember every time they were taken off.

Q. I did not ask you that. I asked you——

A. I never went around to look.

Q. You do know that they were taken off on several occasions when you were grinding horses' feed, on Saturdays?

A. Very seldom did we grind horses' feed on Saturdays after four o'clock.

Q. But you did, as a matter of fact, or at least witnesses have testified on several occasions they were taken off in order to grind feed?

A. To cut the feed.

Q. To grind the feed?

A. To cut the feed and take in hay.

Q. Well, to mash it is to grind it. You do, as a fact, do you not?

A. I can say about taking in corn, because I did the grinding of the corn.

Q. Do you not know that this machinery was run in connection with your part of the department on several occasions, and on those occasions did you go around and put it on the pulley?

A. On one occasion Mr. Parsons came after me, and the next time I passed through the engine-room and Mr. McDade requested me to put it on before I went upstairs, and on the next occasion I asked Mr. Kline——

Q. Those are the only occasions that you remember?

A. The only occasions that I remember.

Q. Other cases, if they existed, are not in your knowledge or memory?

A. No, sir.

Q. But it is in your memory that you didn't pass from the shop, from your department, to see whether the belts were properly placed or not?

WITNESS: To see if they were properly placed?

Q. To see if they were placed at all or not?

A. I said I passed through the engine-room on one occasion knowing that the belt had been off, and I asked the question, who replaced the belt, and Mr. Kline said he did.

Q. And those are the only cases *in which*, apart from the occasions of repair, to which your attention was called?

34 A. Yes, sir. I cannot say any more than I know of.

Mr. TOTTEN: Did you ever put Mr. Morgan's belt on for him?

A. Yes, sir.

Q. Often?

A. Yes, sir.

Q. He is in the same room with McDade?

A. Yes, sir; on the same shaft.

At this point the court took the usual recess.

After Recess.

Examination of EDWIN MOORE (continued).

By Mr. TOTTEN:

Q. What are the dimensions of the pulley carrying the belt which injured McDade?

A. Thirty inches diameter and a six-inch face.

Q. Six inches thick?

A. Six inches face, that wide, of that breadth.

Q. At an ordinary speed of the engine, what would be the number of revolutions a minute of the pulley?

A. 180 revolutions per minute—that is, the pulley that Mr. McDade got caught with, not including the one at the fan.

Q. The one at the fan makes many more?

A. Yes, sir.

PETER KLINE, a witness produced on behalf of the defendant, being first duly sworn according to law, was then examined in the cause on the trial thereof, and testified as follows:

Direct-examination.

By Mr. TOTTEN:

Q. What is your name?

A. Peter Kline.

Q. Where do you reside?

A. Georgetown.

Q. What is your business?

A. I am employed as an engineer in the Washington & Georgetown Railroad building.

35 Q. How long have you been engaged in the business as an engineer?

A. About twenty-five years.

Q. Are you a skilled man at that business?
A. I cannot say that I am skillful, but I manage to get along.
Q. You have been engaged in the business twenty-five years?
A. Yes, sir.
Q. You are engaged in it now?
A. Yes, sir.
Q. How long have you been running that engine in the Georgetown shop?
A. About five or six years since the engine has been put in there. There was one man there about a year before I was.
Q. You have been there five or six years?
A. Yes, sir.
Q. What is your business there?
A. To keep up steam, to keep up power.
Q. How much power do you keep up?
A. Seventy-five pounds.
Q. Who gives you your orders and instruction about the conduct of your work there?
A. Mr. Hawk.
Q. What is he?
A. He is foreman.
Q. Foreman of the shops?
A. Yes, sir.
Q. He gives you your directions as to when and how you shall run. How does he communicate his orders to you?
A. By ringing the bell.
Q. How many strokes to stop and how many to start?
A. Two to stop and one to start.
Q. Do you run this engine yourself?
A. Yes, sir.
Q. Have you any other duties outside of the engine-room?
A. No, sir.
Q. Your business is to supply the engine with fuel and manage it?
A. Yes, sir.
36 Q. And control it?
Yes, sir.
Q. Have you anything to do with the belting?
A. No, sir.
Q. Any part of your duty to put the belts on?
A. No, sir.
Q. Do you know McDade?
A. Yes, sir.
Q. Did you know him during the time that he was employed in the shop next to you?
The WITNESS: Did I know him?
Q. Whilst he was employed there?
A. Yes, sir.
Q. And you know him now?
A. Yes, sir.

Q. The blacksmith shop in which he was engaged in his work is adjacent to the engine-room where you were engaged in your work?

A. Yes, sir.

Q. Had he anything to do with your engine-room or your engine or your work or you?

A. No, sir.

Q. Had you anything to do with his work or with him?

A. No, sir.

Q. Did you ever give him any orders?

A. No, sir.

Q. Did you ever pretend to?

A. No, sir.

Q. Had you any right to?

A. No, sir.

Q. Mr. McDade received an injury on the morning of the 5th of February, 1883; do you remember that fact?

A. Yes, sir.

Q. Will you tell the jury all that you know about that accident. Tell the jury what McDade said to you immediately prior to the accident, and what you said to him, and what he did, so far as you know, and what you did. Just begin and tell the jury what happened that morning.

A. Well, on the morning of this accident when the bell
37 rang for seven o'clock, I started up the engine and it had been running about four or five minutes.

Mr. COLE: Not so fast; talk slowly.

WITNESS (continuing): Well, McDade came in the engine-room, and he said, "I wish you would come out and help me with my belt." I went out into the blacksmith shop, and when I got into the blacksmith shop he says, "How am I to get that belt back on this side of the pulley?" I got up on the ladder and I threw the belt back on the right side of the pulley, and I tried to put it on, but I could not put it on, and I came down the ladder and I said, "Hold up."

Q. You came down the ladder?

A. I came down the ladder and I said, "Hold up until I shut down."

Mr. COLE: You say you got up and threw the belt over on the side where the ladder was?

A. Yes, sir.

Q. Then what did you say you did after you threw the belt over on the side where the ladder was?

A. I tried to put it on.

Q. (By Mr. TOTTEN:) Go on.

Mr. DAVIDGE: How did it fall when you pulled on the far side—to the right side?

A. To the right side.

Q. It came back to the right side?

A. Yes, sir.

Q. Then you got down?
A. Yes, sir.
Q. And what did you say?
A. I said, "Hold up until I shut down."
Mr. TOTTEN: To whom did you say that?

Mr. COLE: Wait a moment.

A. I did not say it to any one in particular, but Mr. McDade was standing there and his help was looking at me. I did not mention any names.
Q. You said it to them?
A. I was talking to them; yes, sir.
Mr. DAVIDGE: How far were they off?
A. Standing right at the foot of the ladder.
Mr. TOTTEN: You said, "Hold up until I shut down?"
38 A. Yes, sir.
Q. What did you do then?
A. I ran into the engine-room and shut the steam off the engine?
Q. You shut the steam off?
A. Yes, sir.
Q. Did you shut it entirely off?
A. Yes, sir.
Q. And then what happened?
A. Then he hallooed.
Q. Did the engine stop?
A. No, sir.
Q. Well, what happened then?
A. Well, the engine didn't stop for this very reason, because the fly-wheel carries it around eight or ten revolutions before it checks its speed.
Q. Before it checks it at all?
A. Yes, sir; and I heard him halloo.
Q. Then what did you do?
A. I stood by my engine until it stopped.
Q. Dead?
A. Yes, sir.
Q. Then what?
A. Then I went out to see what was the matter.
Q. And found that he had been injured?
A. Yes, sir; saw that he was injured.
Q. In shutting the steam off from the engine you say you shut it off entirely?
A. Yes, sir.
Q. After shutting the steam off from the engine how many revolutions did you say the fly-wheel makes before the speed is checked or begins to check?
A. It makes about twelve revolutions before it checks its speed at all. That is only so when we check the speed by turning the steam off immediately; that causes it.
Q. How much motion should there be in the pulley when the belt is taken off?

A. It should run very slow.

Q. Did you intend to stop the engine entirely?

A. Not entirely, only until it slacked up so that it turned only slowly.

Q. You intended to let the steam on when it should check up sufficiently?

39 A. Yes, sir.

Q. Can you tell the jury how long a time elapsed between the time you checked the steam off and when you heard the plaintiff call you or cry out?

A. About a second.

Q. No longer than that?

A. No, sir.

Q. When you heard the cry the engine was at full speed?

A. Yes, sir; with the steam shut off.

Q. Had the steam been shut off?

A. Yes, sir; with the steam shut off.

Q. How long a time did it take you to go from the ladder, after you told McDade to hold up until you shut off the steam, to go to your engine?

A. About a second.

Q. How far is it?

A. About twenty or twenty-five feet.

Q. You had to pass through the door?

A. I did not walk; I ran.

Q. You did run?

A. Yes, sir.

Q. Was that the quickest way for you to slow down, shutting off the steam entirely?

A. Yes, sir.

Q. Before the motion was entirely gone you could keep it up by letting on steam again?

A. Yes, sir.

Q. Tell the jury why that is the quickest way to slow down.

A. For this fly-wheel is heavy; that was at full speed, and when I shut off the steam the fly-wheel is so heavy that it gives eight or ten revolutions before the speed is checked, and if you add to this momentum by letting the steam off it takes longer to slow down and stop.

Q. Is there anybody about that shop, or was there previous to that time any person, whose business it was to put on belts?

A. Yes sir.

Q. Who was the man?

A. Mr. Moore.

Q. What is his business about there?

A. Miller.

40 Q. Do you know Mr. Parsons?

A. Yes, sir.

Q. Did you know the nail-maker, Morgan?

A. Yes, sir.

Q. Are you still employed in running the engine?

A. Yes, sir.

Q. Can you give the jury and the court an idea how many times between the time that Eckrit left and this man was injured this belt was taken off for any purpose?

A. About thirteen or fourteen times.

Q. Was it taken off as many as twenty times in that sixteen or eighteen months?

A. I do not think it was.

Q. On what occasions or for what purpose was this belt thrown off that pulley?

A. When we were hoisting hay and grinding corn.

Q. Was that at all times, or after four o'clock?

A. After four o'clock.

Q. On what day?

A. On Saturdays.

Q. Any other time?

A. No, sir.

Q. Are you familiar with what was going on in the blacksmith shop during this period? Were you in there frequently?

A. Well, I passed there every day.

Q. Could the strap be thrown off without your knowing it and be off any length of time?

A. Yes, sir.

Q. It might?

A. Yes, sir.

Cross-examination.

By Mr. COOK:

Q. You are an engineer?

A. Yes, sir.

Q. How long have you been such?

A. About twenty or twenty-five years.

Q. And I understand you to say that your duties are confined to the engineer's office?

A. Yes, sir.

Q. And didn't extend beyond it?

41 A. No, sir.

Q. That was under instructions that you received from whom?

A. Mr. Hawk.

Q. On the morning of the accident you learned from McDade, perhaps, in connection with his assistant, Parsons, that there was some difficulty in placing the belt?

Mr. TOTTEN: He didn't say that.

Q. Who was present when the conversation took place at the foot of the ladder that day, if anybody was there at that time?

A. McDade and Parsons.

Q. The conversation was in the hearing of both of them?

A. Yes, sir.

Q. Parsons is dead?

A. Yes, sir.

Q. And you say at that time that your attention was called to the belt and you made an effort to place it?

A. Yes, sir; but I went to put it on at his request. He asked me to go and help him with that belt. I was out of my line of duty when I was out there.

Q. You came out when you learned that there was a difficulty with the belt, and you made an effort to place it?

A. Yes, sir.

Q. You went upon the ladder and you failed?

A. Yes, sir.

Q. And a skilled engineer. Now, then, you came down the ladder, and, finding that you could not place the belt, you said to McDade—McDade and Parsons—that you would go and slow up your engine?

A. I said I would shut it down.

Q. That you would go and shut it down, and you did go and shut it down, and you shut it down by letting off the steam; that is all of it?

A. Yes, sir.

Q. What is the immediate effect of letting off steam?

Mr. TOTTEN: He didn't say that. He said shutting it off.

Mr. COOK: Well, that is about the same thing.

42 Mr. TOTTEN: No, there is a great difference between letting off steam and shutting it off.

Q. You shut it off?

A. Yes, sir.

Q. What is the immediate effect of shutting it off—the instantaneous effect—if any?

A. Well, it will not stop instantly after it is first shut off.

Q. I am not asking you whether it will stop instantly—come to a stand-still. I asked you whether there was any instantaneous effect arising from shutting off the steam.

A. Not immediately.

Q. How soon is there an effect?

A. Well, in half a minute.

Q. What is the effect after the lapse of half a minute?

A. The engine begins to slack; it just speeds slow.

Q. Begins to reduce its velocity?

A. Yes, sir.

Q. How long does it take for the velocity or force to entirely cease, so that the engine will come to a stand-still?

A. I suppose it will take about three-quarters of a minute.

Q. So that the whole thing is ranged in from a half of a minute to three-quarters of a minute?

A. Yes, sir.

Q. And you say almost immediately after you arrived at your engine and shut off the steam that you heard the cry of McDade?

A. Yes, sir.

Q. How soon after?
A. About a second.
Q. You had shut it off?
A. Yes, sir.
Q. You had given him no sign or indication or signal that it was shut off?
A. No, sir; because he was in the next room, on the other side of the room.
Q. And could not receive any signal?
A. No, sir.
Q. All that he could do was to observe the force or velocity
43 or movement of the machinery about him as derived from your engine?
A. Yes, sir; I should think that he could see that it was going slack.
Q. Now, all this occurred, giving the utmost limit, within three-quarters of a minute?
A. Yes, sir.
Q. And you say it was Mr. Moore's business about the belts. What do you mean by that?
A. Mr. Moore's business was to put the belts on, mend the belts, and fix the belts all over the place, and even in my engine-room, although I am accustomed to fixing my belts. If there is anything the matter with the belts I send for Mr. Moore; I do not even do it myself.
Q. If your belts got out of order it was your duty to send for Mr. Moore and have them put in order?
A. Yes, sir.
Q. That is the whole of it?
A. Yes, sir.
Q. And if it was not out of order you didn't send for Mr. Moore?
A. No, sir; there was no occasion to send for him.

Redirect examination.

By Mr. TOTTEN:

Q. Where did you last see McDade prior to the accident?
A. Standing at the foot of the ladder.
Q. That was just after you told him to hold on until you shut off the steam?
A. Yes, sir.
Q. And then you started and ran, and ran into the engine-room?
A. Yes, sir.
Mr. DAVIDGE: There was a question put to you by Col. Cook in regard to your being an engineer, and he seemed to think it strange that you had nothing to do with throwing off the belt. I understand that your duty as an engineer was to keep up the power?
A. Yes, sir.
Q. And you had nothing to do with the distribution of that power?
A. No, sir.

44 Q. You had to watch the engine and keep up the power?
A. I had to furnish the power and the other men had the distribution of it.

By a JUROR:

Q. How many revolutions did your engine make?
A. About seventy revolutions.
Mr. COLE: A minute?
A. Yes, sir.
Q. And the fly-wheel?
A. The fly-wheel makes the same as the engine.
Mr. TOTTEN: What is the diameter of the fly-wheel, if you know?
A. Eight feet.
Q. Do you know how much it weighs?
A. About twenty-five hundred pounds, and maybe more.
Q. The fly-wheel?
A. Yes, sir.
Q. Do you know the number of revolutions of this pulley in the blacksmith shop—this pulley on which you tried to put this belt?
A. It makes about a hundred and sixty a minute.

The plaintiff was recalled in his own behalf and examined and cross-examined in rebuttal, and on his said cross-examination testifies as follows, to wit:

Cross-examination of the plaintiff in rebuttal.

By Mr. DAVIDGE:

Q. You don't profess to be able to ascertain with any sort of correctness the time you were on that ladder waiting for the engine to be slackened up?
A. Nothing more than any other man would, merely from his judgment.
Q. You were not watching the passage of time?
A. I had no watch in my hand at all.
Q. You were not watching the passage of time?
A. I had no watch in my hand to watch the time.
Q. Of course, I know that you had no watch.
A. That is the only way that I could tell you correctly.
Q. You say that the engine slacked up. How much did the engine slack, you don't profess to know?
45 A. I could not tell exactly; I saw the engine had slacked up some.
Q. Did you go up the ladder immediately upon Kline leaving you?
A. No, sir; Kline had got into the engine-room before I got up.
Q. But you immediately went up the ladder?
A. Yes, sir; it took some time to get up.
Q. You were standing at the foot of the ladder? How many rounds did you have to go up?
A. About ten, I suppose.

Q. Kline left first to go to the engine?
A. Yes, sir.
Q. And after he left you immediately ascended the ladder?
A. Yes, sir.
Q. And attempted to put the belt on?
A. Yes, sir.
Q. That, as I understand you, is what you have stated. Now, Mr. McDade, I would be very glad to know why you tried to put that belt on. Did you consider it a part of your duty?
A. Well, I considered that I had to go to work or be discharged.
Q. Did you consider putting that belt on any part of your duty?
A. I could not get along——
Q. You have just now avoided answering my question. Did you consider putting that belt on any part of your duty?
A. Well, I did not consider anything about it at all; I did not know anything about it.
Q. Why did you undertake to put the belt on?
A. Just from natural causes, because I have done it before.
Q. What do you mean by natural causes?
A. Because I knew that I had to go to work or quit.
Q. You had been in that shop eighteen months. Do you mean to say that you did not know whether it was your duty to put on the belt? You didn't know whether it devolved upon you or anybody else?
A. I did not.
Q. If it did not devolve upon you, who, in your judgment, was the party upon whom it did devolve?
46 A. I did not know; I never was told.
Q. Now, sir, how often in eighteen months have you looked at that pulley?
WITNESS: Had I looked at it?
Q. Yes.
A. I could not tell you. I looked at it many and many times every day; maybe fifty times a day and maybe not at all.
Q. You knew it revolved, and revolved rapidly?
A. Yes, sir.
Q. You knew on this morning it was revolving with great rapidity, because it was the beginning of the day, and it went faster than it would go after the machines were being fed?
A. No faster than any other day; no faster than any other morning.
Q. That I understand; but immediately upon starting the machinery, when the machinery was not working, not consuming its power, it goes with very great rapidity, does it not?
A. I do not know that it does any more than any other time.
Q. You don't think that it goes with any more rapidity before the machines have to be supplied and are using it than it does after the belts are put on and its power is consumed? It is not very important, however. (To witness:) I understand you, now, to tell this jury that after having been in that shop for eighteen months you don't know whether it was your duty or not to put on that belt?

A. Why should I know it? I never was told whose duty it was.

Q. Never mind what you were told. What was your own view of the matter? Did it devolve upon you or did it devolve upon somebody else? If somebody else, upon whom did it devolve?

A. I could not tell you whose duty it was. I had never been told whose duty it was.

Q. But it so happened that you always did it as a part of your duty?

A. I always did.

Q. You did it as you would any other work about your forge?

47 A. Not that often.

Q. But as regularly?

A. Not as regularly.

Q. You had not put it on as often as your attention was called to your other duties?

A. No, sir.

Q. But suppose you had used the bellows instead of the fan, you would have put on this belt just as naturally as you would turn to your bellows to use it if you had not had that fan?

A. I do not understand.

Q. You have testified that you regularly put on the belt?

A. Yes, sir; when it was off.

Q. I say, now suppose you had not been using the fan, but had used your bellows in order to get a blast?

A. I could not get any blast from the bellows.

Q. But I am simply putting it by way of illustration. What I mean to say is that you put on the belt in order to get a blast, just — naturally as you would have turned if there had been no fan there and your bellows would give the same blast?

A. Certainly.

Q. Yet you didn't know whose duty it was?

A. I had never been informed whose duty it was, why should I know?

Q. One would think that you should know, when you did it every day. Did anybody ever tell you to put the belt on?

A. No, sir. I said in my testimony the other day that I was told to put the belt on by Mr. Kline.

Q. You name a single occasion when Kline said to you, Why don't you do it. You on that occasion had asked him to put on your belt, and his reply was, "Why don't you do it yourself?"

A. Yes, sir.

Q. That was not telling you to put on the belt, was it?

A. It was telling me to put it on; it was telling me that he would not do it.

Q. Did Mr. Kline have anything to do with the belting, as engineer, about that building?

A. That I could not tell you.

Q. Well, you don't mean to say that it was the business of Mr. Kline to attend to this?

48 A. I have seen Mr. Kline put on the belt.

Q. But do you mean to say, from your knowledge, that Mr. Kline had anything to do with the business of putting on the belts?

A. I mean to say nothing of the kind. I mean to say that I do not know anything about it.

Q. Now, Mr. McDade, you are a man of ordinary observation, are you not?

A. I presume so.

Q. No doubt of it.

A. I presume so.

Q. You know what danger is as well as any other man, do you not?

A. Well, of course I know what danger is. I ought to know.

Q. You ought to know. You have as fine a sense of danger as the generality of men?

A. I know more now than I would then.

Q. I am speaking now.

A. I didn't know that there was any more danger in putting on that belting than there was for me to pick up a hammer and hit a piece of iron with it.

Q. Do you mean to say that?

A. Yes, sir.

Q. You knew the revolutions of that wheel, did you not?

A. No, sir.

Q. You didn't know how many times it went around in a minute?

A. No, sir.

Q. But you knew it revolved?

A. Yes, sir.

Q. Did you not know that it revolved very rapidly?

A. I knew it revolved right fast.

Q. And you state that after an experience of eighteen months you supposed that there was no more danger in attempting to put on a belt than in picking up a hammer on the floor?

A. I did not know that there was a bit more danger.

Q. Then it would appear that you are not as much alive to danger as the generality of men?

A. That might be.

Q. Now, one word more. You have said that whenever
49 the belt was taken off to be repaired you have known Moore to come into the room and put the belt on, but you seem to draw a line of distinction between cases when the belt was repaired by Moore and when it was not. When the belt was repaired was there anything in the situation to require the attendance of Moore at that time to put the belt on rather than at other times?

WITNESS: I do not exactly understand you.

Q. I will try to give it to you, because I want you to understand it fully, and if you don't, say so, and I will endeavor to put it plainer. You have said in your evidence that Mr. Moore repeatedly came into your room when the belt was off and had been repaired, and in those cases he would put it on, and you seem to draw a line of distinction between the cases when the belt had been repaired

and when it had not been repaired. Now, I want to know whether there was anything in the repair of the belt to make the presence of Moore necessary on those occasions more than at other times?

A. I beg your pardon; I did not know I had said anything of the kind, that Mr. Moore would come in repeatedly after the repair of the belts; I did not say anything of the kind. I said Mr. Moore would come in and repair the belt; that is what I said, sir, and that is what I meant to say. After he repaired the belt he had to put it on; he would put it on to try it.

Q. He would put it on to try it?

A. Yes, sir.

Q. That is all there is in it. You don't mean to tell this jury that there was anything in a repaired belt which required the attendance of Moore any more than for a belt which had not been repaired?

A. The job was not finished until he put the belt on.

Q. So I understand. After he repaired the belt he put it on to see whether it was all right. Now, tell me another thing, Mr. McDade, for this is to my mind a very simple matter. You say that Kline told you, "Mac, go up the ladder and I will slow up the engine?"

A. "Go up and put it on whilst I slow up the engine." Those were his words.

50 Q. You knew that Kline had no right to give you an order, did you not?

A. I did not; I do not know that I did.

Q. You did not even know that?

A. I did not consider the point; no, sir.

Q. You didn't know that?

A. No, sir.

Q. Then why did you obey that order?

A. I did not consider anything about it. I simply went up the ladder as he suggested.

Q. I would like to know what you did know. You don't appear to have known anything in relation to this matter.

A. I would have known if I had thought that I was going to have my arm taken off; I should not have obeyed his orders.

Q. But whilst you didn't know that your arm was to be taken off you did know, I presume, that the forces into contact with which you were to come might involve danger, or did you not know that?

A. I did not know that; I did not think anything of the kind.

Q. You didn't even know that?

A. I didn't even know anything of the kind.

Q. You didn't even think anything about it. You are, then, not a man of ordinary intelligence, are you?

A. I think I am.

Q. You think you are?

A. Yes, sir.

Q. And yet you came into contact with forces involved at that pulley. You could not come into contact with them and yet not be aware that you were in presence of danger; that is the sort of a man

you are? Now Kline says, according to your recollection, "You go up the ladder and put the belt on, and I will slow up the engine." Did you not understand that that engine was to be slowed before you put on the belt?

A. Well, it was slowed.

Q. Well, you are not answering my question.

A. Of course, I understood that it was to be slowed, and, as I told you, it was slowed.

Q. You formed your own judgment as to whether it had been slowed enough to enable you, with your skill, to put on that belt with safety?

A. I supposed it was safe.

51 Q. You do not answer me.

A. I do not exactly answer as you want me to do.

Q. Do not lose your temper. Let me see now if I understand you. Let me go on and I will repeat it, and if you want any time you shall have as much as you desire. Kline says to you, "Mac, go up the ladder and put on the belt and I will slow the engine?"

A. Those are the words.

Q. Then I asked you whether you did not understand from what you say Kline told you that you were to wait for that engine to be slowed?

A. Kline didn't tell me anything of the kind. He didn't tell me anything of the kind. He only said, "Go up the ladder, put the belt on, and I will slow the engine."

Q. Now, did you not understand by that that the engine was to be slowed up sufficiently to enable you to put on that belt?

A. Kline didn't tell me how much the engine was to be slowed up.

Q. I didn't ask you what he said. You have told what he said, and need not state any more on that subject. I want to know whether you did not consider from that remark of Kline's that you were to wait until the engine was sufficiently slowed to enable you to put on the belt?

A. There was nothing of the kind. He did not say sufficiently slow or anything of the kind.

Q. I am not speaking of what he said. I am speaking of what you understood.

A. I understood that he was going to slow up the engine.

Q. For what purpose?

A. To enable me to put on the belt.

Q. Then the belt was not put on until the engine was sufficiently slowed?

A. The belt was not to be attempted to be put on until it was slowed; whether sufficiently slowed or not I do not know. I did not attempt to put the belt on until the engine was slowed; whether it was sufficiently slowed or not I do not know.

Q. Put it again; this is No. 5. Did you or not understand from what Kline said that that engine was to be slowed so as to enable you to put on that belt?

52 A. If you would ask me if I understood that the engine was to be stopped for me to put on the belt——

Q. I am not asking you about the stopping of the engine. If it stopped absolutely it would not facilitate the putting on of the belt. I repeat it again: Did you not know, did you not understand, that the purpose of slowing that engine was to enable you to put on the belt?

A. Yes, sir; I did.

Q. Then I want to know whether you did not form your own judgment as to whether that engine had been sufficiently slowed to enable you to put on that belt, with the skill that you possessed?

A. I suppose I did.

Q. That was your judgment as you stood upon that ladder. Was there anybody in the world to decide that matter but you, as you stood upon the ladder? Were you not the judge as to whether that pulley had been sufficiently slowed to enable you to put on that belt?

A. I believed it was slowed up enough.

Q. That was a matter for your judgment, and you decided that it was sufficiently slowed up?

A. I did not take time——

Q. But you acted that way?

A. Yes, sir.

Q. Do you know as to whether you decided it had been sufficiently slowed?

A. Whenever I had work to do I always done the work as quick as I possibly could. I always worked for the interest of my employers.

Q. Did you think that the interest of your employers would suffer in half a minute when your safety was involved at the same time?

A. I did not stop to think about it.

Q. So I supposed; and yet you say you, as you stood upon that ladder, was the only person who had any thinking to do with respect to the work in hand.

A. As I told you, my custom was to do work as quickly as I could; I never lost any time, never consumed time unnecessarily.

Q. So I understand, never lost any time. But here you say that on this occasion the very purpose of Kline in slowing down
53 the engine was to enable you to get that belt on?

A. He did not say slow down the engine; he said slow up the engine.

Q. We will not dispute about words, and I need not pursue it any further. The amount of it is that you did know that the engine was to be slowed up or slowed down to enable you to put on the belting, and you stood alone of all the men on this earth upon that ladder, and you came to the conclusion that the engine had been sufficiently slowed up or slowed down to enable you to do that work. Reaching that conclusion, you undertook to do it?

A. I undertook to do it; of course I did.

Q. Now, I want to put another question—that is, whether you did not know at that time that the difficulty in getting on the belt when

the pulley was moving rapidly was greater than when the pulley was moving slowly?

A. I did not.

Q. You didn't even know that?

A. No, sir.

Q. You didn't know anything?

A. Some things I know and some things I don't.

Q. You put the belt on a great many times according, to your statement. Is it not easier to put the belt on the pulley when it is revolving slowly than when the pulley is revolving rapidly? Do you not know that?

A. I cannot say that there is a very great difference.

Q. Is it not easier to put it on when the pulley is revolving towards you, when you face the pulley?

A. I do not know that that would make any difference.

Q. If it is revolving one way you would use one hand, and if it is revolving the other way you use the other hand. Do you use both hands with equal facility?

A. Not now I do not.

Q. Did you at that time?

A. That is the question you asked me just now, if I did at this time.

Q. No one can doubt your intelligence now. I do not ask you now whether one hand is as good as another; but at the time of the accident—before the accident—did you use one hand with as much facility as the other, as a great many people do?

54 A. For some things I did and for some things I did not. I used a fork in my left hand and my knife in my right hand. I could not use a knife in my left hand.

Q. You were not left-handed, were you?

A. No, sir.

Q. You did not use both hands with equal ease, did you?

A. I did wherever it was necessary. I could use either hand in some places just as well as the other.

Q. In other words, you are right-handed?

A. If I was going to strike a piece of iron I could strike it just as well with one hand as with the other.

Q. You spoke of two cases when Kline gave you orders to do work?

A. Yes, sir.

Q. Were those orders connected with belting in any way?

A. They were connected with machinery.

Q. You have a way of not replying to my questions. I asked you whether those orders were connected with belting?

A. One was, I think, for a shift for hoisting. I do not know whether you call it a shift or not; something for hoisting coal out of a boat in the canal upstairs to drop down into the coal-room, where the engineer was firing from.

Q. Had the other order anything to do with the belting in your shop?

A. No, sir.

Q. Either to put it on or to put it off, or anything connected with the belting?
A. No, sir.
Q. For work to be done in his shop?
A. Yes, sir.
Q. For the purposes of his shop?
A. Yes, sir.
Q. This work was done in your blacksmith shop?
A. Yes, sir.

II.

Thereupon, the testimony on both sides, as mentioned in
55 this bill of exceptions and in the first bill of exceptions, which is referred to and made a part hereof, being closed, the defendant, by its counsel, moved the court to instruct the jury to render a verdict for the defendant; but the court denied the said motion and refused to so instruct the jury. Thereupon the defendant, by its counsel, then and there excepted to the ruling of the court in refusing his said motion and in refusing to so direct the jury; which exception was noted at the time upon the minutes of the court and constitutes the second bill of exceptions of the said defendant, and it prays the court to sign and seal this its second bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

Prayers Granted.

Thereupon, the testimony on both sides being closed as aforesaid, the counsel for the defendant asked the court to grant the three (3) prayers following, which the court accordingly granted, to wit:

If the jury shall be satisfied from the evidence that the plaintiff himself so far contributed to the accident by his own negligence or want of ordinary care and caution; that but for such negligence or want of ordinary care and caution on his part the accident would not have happened, the plaintiff cannot recover and the verdict must be for the defendant.

(Granted.)

W. S. COX.

If the jury shall be satisfied from the evidence that the foreman of the shop, who was the superior over the plaintiff in the shops, on the Saturday preceding the Monday on which the accident happened to the plaintiff, ordered and directed the plaintiff to throw the belt in question off its pulley, and on Monday morning to send for Moore, the miller in charge of the belts and belting, to put it on again, the plaintiff cannot recover. He was bound to obey such an order issued by the foreman, and his neglect so to do was such
56 negligence as precludes his right to recover in this action, and your verdict must be for the defendant.

(Granted.)

W. S. COX.

Assuming that putting on the belt was attended with danger, the question of fact to be determined by the jury is not whether the plaintiff knew of such danger, but whether a man of ordinary observation would, in the situation of the plaintiff, have knew [known] it. If a man of ordinary care and observation would have known the danger, it matters not that the plaintiff did not know it. The latter is held to possess ordinary observation, and the jury are instructed that if with such observation and care he would have known the danger, then in undertaking to put on the belt he assumed all the risks incident thereto, and for any injury incurred in such undertaking he is not entitled to recover.

(Granted.)

W. S. C.

III.

The court thereupon voluntarily and on its own motion and upon the testimony set forth in the first and second bills of exception, which are hereby referred to as part of this exception, gave the following instruction to the jury:

"If the jury find from the evidence that after he was employed by the defendant the plaintiff voluntarily and without being required so to do attended to the belt and habitually and with the knowledge of defendant's officers placed the same in position without accident, and his course of conduct in relation thereto was such as to induce the defendant or its officers to believe that he had the requisite skill for that purpose, or that he had willingly assumed the duty of so placing the belt, the defendant was not in default for not having instructed him as to any danger incident to the operation."

But the counsel for the defendant interposed and objected to the giving of said instruction to the jury; but the court overruled said objection and gave the said instruction, which was read to the jury; to which ruling and the giving of said instruction to the jury the defendant's counsel duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its third bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

57

WALTER S. COX, *J.* [SEAL.]

IV.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

"If the jury shall be satisfied from the evidence that it was no part of the duty of the plaintiff in his employment by the defendant to put the belt by which he was injured upon the pulley, and that he volunteered to put it on, and in the attempt was injured, he cannot recover."

But the court refused to grant said prayer and allow the same to be read and given to the jury; to which opinion and ruling of the

court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its fourth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

V.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

"If the jury shall find from the evidence that the defendant company, during all the time the plaintiff served the defendant and up to the time of the accident, employed and kept in the shops where the accident happened a man charged with the duty and whose business it was to put all the belts on their pulleys when needed for
58 use, the plaintiff is chargeable with notice of that fact, and if, notwithstanding that fact, he attempted to put the belt on the pulley and was injured, he cannot recover."

But the court refused to grant said prayer and allow the same to be read and given to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its fifth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

VI.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

"If the jury shall find from the evidence that the machinery in the blacksmith's shop was reasonably well adapted to the accomplishment of the work to be done and such as a reasonably prudent person would select for the purpose, and that it was kept by the defendant in reasonably good order and condition, and was in reasonably good order and condition at the time of the accident, the defendant is not liable for the injury to the plaintiff, and the verdict must be for the defendant."

But the court refused to grant said prayer and allow the same to be read and given to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its sixth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

VII.

59 Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

"If the jury shall find from the evidence that the plaintiff was in the habit of putting the belt on the pulley during the period of ten or twelve or fifteen months as a part of his duty, and that at the time of the accident there was substantially no more danger in so putting the belt on the pulley than when he first began to put it on, the plaintiff cannot recover, and the verdict must be for defendant."

But the court refused to grant the said prayer and allow the same to be read and given to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its seventh bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

VIII.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

"If the plaintiff, having seen Eckrit put on the belt and believing he, the plaintiff, could do so, undertook after Eckrit left, of his own motion and without being directed so to do by the defendant, to put on the belt, and afterwards habitually put it on without accident, and was seen by the officers of the defendant from time to time to put on the belt without accident, then the defendant had the right to assume that the plaintiff had sufficient skill to put it on, and was under no obligation to warn the plaintiff of the danger incident to the operation."

But the court refused to grant said prayer and allow the
60 same to be read and given to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its eighth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

IX.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

"Assuming that machinery with pulleys and a 'shifter' would in

some respects have been safer than that provided by the defendant, the cause of the injury was not the absence of the pulleys and 'shifter.' These appliances have nothing to do with putting on the belt; they may prevent the necessity of taking off the belt, but that is all. Here the belt was off and the plaintiff, undertaking to put it on, was in law bound to know whether he had sufficient skill for the purpose; and if he had not, and undertook it, he cannot recover."

But the court refused to grant said prayer and allow it to be read and given to the jury; to which opinion and ruling of the court the defendant, by its counsel, excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its ninth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

X.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

61 "If the jury shall be satisfied from the evidence that the defendant employed, and for several years and at the time of the accident kept in its shops, wherein the accident happened to the plaintiff, a man whose business it was [*exclusively*] to put all the belts on their corresponding pulleys when off and when needed for use [*and this fact was known to plaintiff*], and that the plaintiff, notwithstanding this fact, undertook to put on the belt in question and in such attempt was injured, he cannot recover. It was his duty to call or send for this man to do this duty, and your verdict must be for the defendant."

But the court refused to grant said prayer, except with the qualifications and modifications enclosed in brackets [ ] in the above copy of the said prayer; to which ruling of the court the defendant duly excepted, as well as [to] the refusal to grant said prayer as asked as to the granting of said prayer with the qualifications and modifications thereunto made; which exception was at the time noted on the minutes of the court, and the defendant's counsel prays the court to sign and seal this its tenth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

XI.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

"If the jury shall find from the evidence that the plaintiff for the period of ten, twelve, or fifteen months habitually put the belt in

question upon the pulley (he must be held to have been)* [*this is a fact tending to prove, and from which the jury may infer that he was*] fully acquainted with any danger which attended the performance of that act or duty, and if, after recognizing such danger, or if, after he had a sufficient opportunity to ascertain [*and reason to know*] whatever danger attended the performance of such act or duty, he continued to put the belt on without giving notice of such
62 danger or making complaint to the proper officer of the company, he was [*must be held to have assumed the risk or to have been*] guilty of such contributory negligence as will bar his right of recovery in this action, and your verdict must be for the defendant."

But the court refused to grant the said prayer, except with the qualifications and modifications enclosed in brackets [ ] and the words crossed out and erased in the above copy of said prayer; to which ruling of the court — duly excepted, as well to the refusal to grant said prayer as asked as to the granting of said prayer with the qualifications and modifications thereunto made; which exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its eleventh bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

XII.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are referred to as part of this exception, to instruct the jury as follows:

"If the jury shall find from the evidence that on the morning of the accident the plaintiff undertook to adjust and put the belt on the pulley and failed, and that he then called the engineer to his assistance, and that the engineer, after making an effort to put on the belt, started back to his engine-room and told the plaintiff to go up and put on the belt, and that he would slow down the engine, and that the plaintiff [*knowing or having reason from his experience to believe that it was necessary to the safety of the operation*], without waiting for the engine to be 'slowed down,' and without waiting for the engineer to come back, or to tell him to go ahead, undertook to put on the belt and was injured, he cannot recover."

But the court refused to grant the said prayer, except with the qualifications and modifications enclosed in brackets [ ] in the above copy of said prayer; to which ruling of the court the
63 defendant duly excepted, as well to the refusal to grant said prayer as asked as to the granting of said prayer with the qualifications and modifications thereunto made; which exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its twelfth

* Words inclosed in parentheses ( ) erased in copy.

bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

XIII.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

"If the jury shall find from the evidence that immediately before the accident the plaintiff attempted to put the belt on the pulley and failed, and that he then called upon the engineer to assist him, and that the engineer tried to put the belt on the pulley, and also failed, and that the engineer thereupon told the plaintiff to 'hold up' or to wait, (and that)* [*until*] he, the engineer, should go and shut down the engine, and that the engineer immediately went and shut off the steam from the engine, and that before the speed of the machinery and pulley was sufficiently diminished [*although knowing or having reason from his experience to know the necessity of waiting therefor*], the plaintiff attempted to put the belt on the pulley and was injured, he cannot recover, and the verdict must be for the defendant. The plaintiff was bound to wait until the speed of the machinery and pulley had been diminished so much that there was no danger in attempting to put on the belt."

But the court refused to grant the said prayer, except with the qualifications and modifications enclosed in brackets [ ] and the words stricken out and erased in the above copy of the said prayer; to which ruling of the court the defendant duly excepted, as well to the refusal to grant said prayer as asked as to the granting of said prayer with the qualifications and modifications thereunto made; which exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its 13th bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

64

WALTER S. COX, *J.* [SEAL.]

XIV.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as part of this exception, to instruct the jury as follows:

"If the jury shall be satisfied from the evidence that the plaintiff knew that the belt was dangerous to handle, (or)* [*and*] that he had been putting it on from time to time for a period of twelve or fifteen months, and without giving notice to any officer of the company of such dangerous condition of the belt, and notwithstanding such knowledge or experience he continued to put the belt on the pulley and was injured [*he must be held to have assumed the risk of accident and*], he cannot recover, and the verdict must be for the defendant."

* Words inclosed in parentheses ( ) erased in copy.

But the court refused to grant the said prayer, except with the qualifications and modifications enclosed in brackets [ ] and the word "or" stricken out in the above copy of said prayer; to which ruling of the court the defendant duly excepted, as well to the refusal to grant said prayer as asked as to the granting of said prayer with the qualifications and modifications thereunto made; which exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its fourteenth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

XV.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as part of this exception, to instruct the jury as follows:

65 "If the jury shall find from the evidence that there was a defect in the machinery, in that there was no fixed and loose pulley on the shaft with a 'shifter' or device to slide the belt from the loose to the fixed pulley and back again, and that the plaintiff [*knowing the danger resulting from such defect*], either with or without directions so to do from the proper officers of the defendant, habitually put the belt on the pulley during the space of twelve or fifteen months, he cannot recover, and the verdict must be for the defendant."

But the court refused to grant said prayer, except with the qualification and modification enclosed in brackets [ ] in the above copy of said prayer; to which ruling of the court the defendant duly excepted, as well to the refusal to grant the said prayer as asked as to the qualification and modification thereunto made; which exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its fifteenth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

XVI.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as part of this exception, to instruct the jury as follows:

"The employer is bound to use ordinary care and prudence in providing proper machinery, but he is not a guarantor of its safety. If he uses ordinary care and prudence he is absolved from responsibility. The machinery need not be the safest of the kind, provided it is such as a person of reasonable care and prudence would provide."

But the court refused to grant said prayer, but in lieu thereof granted the following, to wit:

"But the jury are instructed that the defendant was not a guar-

antor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and arrangement
66 and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe."

To which ruling of the court the defendant duly excepted, as well *as* to the refusal to grant said prayer as asked as to the granting and giving of the said substitute therefor which exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its sixteenth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

XVII.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as a part of this exception, to instruct the jury as follows:

"The plaintiff in putting on the belt, whether acting in the line of his employment as blacksmith or passing beyond that line with the knowledge and acquiescence of the defendant, is responsible for the risks incident to the putting on of the belt."

But the court refused to grant said prayer, except with the qualifications and modifications following, to wit: "*Which were apparent or which he knew of or would have known of in the exercise of ordinary care.*"

To which ruling of the court the defendant duly excepted, as well *as* to the refusal to grant the said prayer as asked as to the qualification and modification thereunto made; which exception was duly noted at the time upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its seventeenth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

XVIII.

67 Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as part of this exception, to instruct the jury as follows:

"The plaintiff, with the aid of Kline, undertaking to put on the belt, is to be held to all the risks incident to that operation."

But the court refused to grant said prayer, except with the qualifications and modifications following, to wit: "*Which were apparent or which he knew of or would have known of in the exercise of ordinary care.*"

To which ruling of the court the defendant duly excepted, as well *as* to the refusal to grant said prayer as asked as to the qualification and modification thereunto made; which exception was duly noted at the time upon the minutes of the court, and the defendant's

counsel prays the court to sign and seal this its eighteenth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

XIX.

Thereupon the defendant, by its counsel, prayed the court, upon the testimony set forth in the first and second bills of exception, which are hereby referred to as part of this exception, to instruct the jury as follows:

"If the failure of the plaintiff to wait until Kline had slowed the engine sufficiently to enable the plaintiff to put on the belt contributed to the injury, the plaintiff cannot recover."

But the court refused to grant said prayer and allow the same to be read to the jury; to which opinion and ruling of the court the defendant, by its counsel, duly excepted, and the exception was at the time noted upon the minutes of the court, and the defendant's counsel prays the court to sign and seal this its nineteenth bill of exceptions, which is accordingly done, now for then, this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

XX.

68 Thereupon the defendant, by its counsel, prayed the court to instruct the jury upon the testimony as set forth in the first and second bills of exception, which said testimony is hereby referred to as a part of this exception, as follows, to wit:

"If the jury shall find from the evidence that the defendant, at the time of the accident and for a long time prior thereto, employed and kept in the shop a man skilled in such work to repair and put in order all belts which might be out of repair or out of order, and that the plaintiff knew the fact of such employment, and that immediately before the accident the plaintiff discovered that there was something wrong with the belt in question [*which might involve danger in adjusting it*], it was his duty to send or go for the man so employed, and if he did not and undertook himself to put on the belt, he cannot recover, and the verdict must be for the defendant."

But the court refused to grant the said prayer, except with the addition of the words in brackets—*i. e.* ["which might involve danger in adjusting it"], as shown in the above copy of said prayer; to which ruling of the court the defendant duly excepted, as well to the refusal to grant said prayer as asked as to the granting of said prayer with said addition and modification thereunto made; which exception was at the time duly noted upon the minutes of the court, and the defendant's counsels prays the court to sign and seal this its twentieth bill of exceptions, which is done accordingly this 18th day of May, A. D. 1886.

WALTER S. COX, *J.* [SEAL.]

69 *Proceedings in General Term.*

MONDAY, *April* 26, 1886.

Proceedings before the supreme court, sitting in general term commencing on the fourth Monday, 26 April, 1886.

Present: Chief Justice Cartter and Justices James and Merrick.

* * * * * * *

MONDAY, *June* 28, 1886.

Session resumed pursuant to adjournment.
Present: Justices Hagner, James, and Merrick.

LEWIS H. McDADE, Plaintiff,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, Defendant. } At Law. No. 25023.

This cause having been argued by counsel on both sides and submitted to the court here upon the record of the special term, and duly considered by the court: whereupon, because it seems to the court here that there is no error in the record and proceedings or in the judgment of the special term, therefore it is considered that the judgment be, and it is hereby, affirmed with costs, to be taxed by the clerk, and that the plaintiff have execution thereof.

70 *Bond for Writ of Error. Filed June* 12, 1886.

In the Supreme Court of the District of Columbia, the — day of ——, 18—.

LEWIS H. McDADE
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY. } At Law. No. 25023. In Error.

Know all men by these presents that we, the Washington and Georgetown Railroad Company, and Henry Hurt and George F. Dunlop, sureties, are bound unto the above-named plaintiff in the sum of thirteen thousand dollars, to be paid to said Lewis H. McDade, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 9th day of July, 1886.

Whereas the above-named Washington and Georgetown Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Washington and Georgetown Railroad Company shall prosecute its said writ of error to effect and answer all damages and

costs if he [it] shall fail to make good his [its] plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE WASHINGTON & GEO. T. R. R. CO.,
Per HENRY HURT, *P't.* [SEAL.]
HENRY HURT. [SEAL.]
GEORGE F. DUNLOP. [SEAL.]

Sealed and delivered in presence of—
J. J. HELLEN.

Approved:
WM. M. MERRICK, *A. J.*

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Lewis H. McDade, plaintiff, and The Washington and Georgetown Railroad Company, defendant, being No. 25023 at law, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 12th day of July, in the year of our Lord 1886, and of the Independence of the United States the one hundred and eleventh.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To Lewis H. McDade:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Washington and Georgetown Railroad Company is plaintiff and you are defendant, to show cause, if any there be, why

the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness William M. Merrick, associate justice of the said supreme court of the District of Columbia.

WM. M. MERRICK, *A. J.*

Service accepted July 20, 1886.

COOK & COLE,
Att'ys for Def't in Error,
Per C. C. COLE.

72 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 6th day of October, 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 6th day of October, 1886.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 6th day of October, 1886.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 137. The Washington & Georgetown Railroad Company, plaintiff in error, *vs.* Lewis H. McDade. Filed October 9, 1886.

Supreme Court of the United States

OCTOBER TERM, 1899

LEWIS T. McDADE

vs.

THE WASHINGTON AND GEORGE-TOWN RAILROAD COMPANY. } No. 137

OPINION

OF THE

General Term of the Supreme Court of the District of Columbia in the above entitled case.

IN THE

Supreme Court of the District of Columbia.

IN GENERAL TERM.

LEWIS H. McDADE, *vs.* THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY.	AT LAW, No. 25,033.

Decided June 28, 1886.

Justices HAGNER, JAMES and MERRICK, sitting.

Copy of opinion of General Term, as published in 5th Mackey, 144.

Mr. JUSTICE MERRICK delivered the opinion of the Court.

This was an action to recover damages for an injury to an employee in the machine shop of the railroad company, resulting, as he claimed, from defective machinery and want of proper advice on the part of the railroad company, of the dangers attendant upon the operation of the machinery in question.

There were twenty exceptions taken at the trial of this case; first, to the refusal of the court to take the case from the jury at the close of the plaintiff's case; second, to the refusal of the Court to take the case from the jury at the close of all the testimony on both sides; and then eighteen different exceptions upon prayers, suggesting various minute

subdivisions of fact and theory with regard to the proper application of the law and the evidence in the case.

In this class of cases the attempt is constantly made to take away the case from the jury, arising from the natural impulse of counsel to avoid, if possible, the influence of human sympathies in favor of misfortune, and to avoid, too, the operation upon their minds of the law of inherent justice, differing from the rule of the common law in this; natural justice suggests, where the misfortune has occurred through a common fault, that the loss should be shared by both parties who contribute to that loss or misfortune; whereas, the doctrine of the common law is antagonistic to the civil law, and says that where there has been a negligent contribution to the misfortune on the part of the plaintiff, he shall have no redress at the hands of the defendant.

The outline facts in the case are, that the plaintiff was employed in the machine shop of the defendant in Georgetown, and while attempting to put a belt over some pulleys, which were connected with the machinery of the shop, the belt slipped by reason of some defect in the machinery or some accident, and his arm was destroyed.

The rules of law applicable to cases of that sort have been well defined and settled so far as the Supreme Court of the United States is concerned, although there has been very great conflict of opinion in the different State courts (and, indeed, in the courts of England, until they were remedied and modified by act of Parliament) as to the extent of the liability of an employer for any misfortune growing out of an act of negligence in respect of machinery or anything else on the part of another person who was employed by the same employer. But the Supreme Court has relieved us of difficulty on the subject, and in the very latest case, decided only four months ago, it has announced that the employee who is charged with the duty of working machinery with another employee is not a co-employee,

in such a sense as to discharge the employer from responsibility for any injury to one of them which happens through the defect of the machinery, although that defect may have been brought about by the negligence of the other employee. The extent of the responsibility is defined by the Supreme Court in the case of Northern Pacific R. R. Co. *vs.* Herbert, 116 U. S., 652, in these words:

"The same considerations which render him (that is, the employer) responsible in such cases for the safe transportation of passengers and property, should also impose upon him an equal responsibility to his employees, so far as their safety depends upon the character and condition of the machinery and appliances used in the transportation. Where the employee is not guilty of contributory negligence, no irresponsibility should be admitted for an injury to him caused by the defective condition of the machinery and instruments with which he is required to work, except it could not have been known or guarded against by proper care and vigilance on the part of his employer."

And then again at the bottom of page 653 of the same opinion, there is another passage desirable to quote in connection with this case.

"In Beeson *vs.* Green Mountain Gold Mining Co., 57 Cal., 20, the defendant, a corporation engaged in quartz mining appointed a superintendent to supervise and manage its mining operations, with authority to employ and discharge laborers at the mine. One of the laborers thus engaged lost his life in a fire, which originated from a defective pipe, put up by a tinner under the supervision of the superintendent, and connected with the engine used to raise ore and take water from the mine. It did not appear that the deceased knew or had reason to know of the defect. In an action by his widow for damages in consequence of his death, it was held against the contention of the company, that the superintendent was not a fellow-employee of the deceased in the sense indicated by the statute; that, for the purposes of

managing the business and determining what machinery should be used and how placed, he was the representative of the company, and that the deceased was not bound to know whether a defect existed in the machinery and appliances not within his view, but had a right to rely upon the implied agreement of the company that the pipe was properly placed and constructed. It was also held that the tinner, in performing his share of the work, was not a fellow-servant of the deceased; that, as his work was done under the direction and supervision of the superintendent, it was the same as if done by the superintendent in person.

Thus the Supreme Court of the United States has defined, with great accuracy and with proper strictness, the limits of the responsibility of the employer with respect to machinery, and with respect to his responsibility for his employees in regard to the performance of their duty towards other employees, so far as the sufficiency of the machinery and the exemption from danger by reason of its use is concerned.

This being the law, and the facts of this case being that the plaintiff was injured by the accidental catching of his arm in a belt which he was endeavoring to put on, and there being evidence tending to show that he knew nothing whatever of the belting having been previously and perhaps imperfectly repaired, and also that the machinery was defective, and that in other parts of the machine shop provisions were made to guard against just such accidents by an arrangement which dispensed with the intervention of the person and allowed the adjustment, the gearing and ungearing of such belts, to be made by machinery, so that the man did not come in contact with it at all, it was proper that the whole matter should be submitted to the jury, both as to the sufficiency of the machinery, the care which had been used with reference to it, and the knowledge or want of knowledge on the part of the plaintiff, of the danger connected with the employment which he undertook.

Under these circumstances, it was quite impossible that the Court could take away from the jury the inquiry into the facts, to wit: the sufficiency of the machinery for the purpose, and the knowledge on the part of the plaintiff, of the dangers connected with it, and of the performance of the duty of the employer to apprise him of whatever dangers might be latent, or even patent, but beyond the reach of his observation with respect to the employment which he undertook.

That being so, I say the Court could not have done otherwise than to remit the whole case to the jury, and it was impossible in such a state of facts to take away from their consideration those mixed questions with regard to which no precise rule can be applied by which to measure them in the particular instance.

After the close of the testimony there were eighteen instructions applied for, but it is not the duty of this Court to go into a minute criticism upon them all. It is sufficient if we find that although some of the propositions which, standing by themselves, may be good law, were rejected, there was enough given to the jury to cover all the law of the case. This was not only all that the party had a right to demand, but all that the Court should have done; and it is no ground of error to reject a good and appropriate prayer, provided the law of that prayer be already sufficiently presented to the jury in other parts of the instructions which may be given.

And we may be allowed to say here, in view of the multiplicity of the prayers and exceptions taken in this case, that it is a serious vice to allow a greater number of instructions to be given to a jury about these matters of diligence on the one hand and negligence on the other, than are necessary for a full understanding of the case. It tends to darken rather than enlighten the judgment of the jury.

The only questions to be presented for the consideration of the jury in this case were, in the first place, whether the

machinery was at all defective; if defective, whether the plaintiff had knowledge of it and whether the employer had reason to suppose that he had knowledge of it; and lastly, whether there was contributory negligence by the plaintiff, assuming that there was a defect in the machinery which ought to have been obviated. With regard to all those matters, the Court granted the first, second and third prayers which were presented by the defendant and which contained all the law to which the defendant was fairly entitled upon the whole evidence. The fourth instruction, which was voluntarily given by the Court, superadded to the others, was the subject of criticism on the part of the defendant. But when that prayer comes to be considered, so far from its being obnoxious to the objection that it takes away any right from the defendant, it is apparent that it gives it perhaps more than it was entitled to at the hands of the Court. That prayer is in these words:

"If the jury find from the evidence that after he was employed by the defendant, the plaintiff voluntarily and without being required so to do, attended to the belt, and habitually, and with the knowledge of defendant's officers, placed the same in position without accident, and his course of conduct in relation thereto was such as to induce the defendant or its officers to believe that he had the requisite skill for that purpose, or that he had willingly assumed the duty of so placing the belt, the defendant was not in default for not having instructed him as to any danger incident to its operation."

In the light of what the Supreme Court has said with regard to the respective duties of employer and employee, and the obligation to impart notice of any defects which may exist in the machinery to the employee of which he has not been previously advised, it is difficult to conceive what just criticism can be based upon that instruction of the Court by a defendant in the case so circumstanced, because it not

only says that the employer shall be exempt if he has reason to believe, from the condition of the party, that he had the requisite skill for that purpose, but it also says that if he willingly assumed and voluntarily undertook to do the thing, then the defendant was not in default for not having instructed plaintiff about any danger incident to the operation.

With these four instructions, therefore, it seems to us that there was no occasion for the Court to go any further, and that no objection could be taken if the Court had stopped precisely at that point.

There are certain other objections taken by the defendant to the modification of certain of its prayers, only three of which we will notice, the eleventh, the twelfth, and the thirteenth.

By the eleventh the defendant prayed the Court to instruct the jury that if they should find from the evidence that the plaintiff, for the period of ten, twelve or fifteen months, habitually put the belt in question upon the pulley, he must be held to be fully acquainted with the danger which attended the performance of that duty; and that if, after recognizing such danger, or, if, after having a sufficient opportunity to ascertain whatever danger attended the performance of such duty, etc., then the company was not responsible.

The Court modified the proposition in this way: Instead of saying that he (plaintiff) must be conclusively held to be acquainted with the danger, it said that these were facts tending to prove, and from which the jury might infer, that he was fully acquainted with the danger, and that he had sufficient opportunity to ascertain and reason to know whatever danger there was; and if they so found, then he could not recover. Now that is precisely within the line of what the Supreme Court has said with regard to the liability of the employer and the employee. Instead of ruling, as a

matter of conclusive law, that he was chargeable actually with knowledge under these circumstances, the Court left it to the jury to determine, and said that these facts thus recited in the prayer were evidence of the fact, but they were not so conclusive and arbitrary evidence of it as to make it a rule of law, so that it should come from the Court with authority; but the facts were to be left, under the circumstances, to the jury to judge of the weight of them and of the extent of the knowledge thus acquired, and that these facts were competent to impute knowledge, provided they were not qualified in the minds of the jury by other circumstances.

So with regard to the twelfth instruction, which was:

"If the jury shall find from the evidence that on the morning of the accident the plaintiff undertook to adjust and to put the belt on the pulley and failed, and that he then called the engineer to his assistance, and that the engineer after making an effort to put on the belt, started back to his engine room and told the plaintiff to go up and put on the belt, and that he would slow down the engine, and that the plaintiff, without waiting for the engine to be slowed down, and without waiting for the engineer to come back or to tell him to go ahead, undertook to put on the belt and was injured, he cannot recover."

This was a demand of the Court to decide that these facts, as matter of law, created an exemption from liability on the part of the defendant. The Court qualified the prayer in this way (and surely, in the light of the numerous authorities, no one can question the propriety of the qualification), that if he, knowing these facts, or having reason, from his experience, to believe that it was necessary to the safety of the operation, then the plaintiff was not entitled to recover.

So with regard to the thirteenth prayer, which is in these words:

"If the jury shall find from the evidence that, immedi-

ately before the accident, the plaintiff attempted to put the belt on the pulley and failed, and that he then called upon the engineer to assist him, and that the engineer tried to put the belt on the pulley and also failed, and that the engineer thereupon told the plaintiff to hold up or to wait until the engineer immediately went and shut off the steam from the engine, and that before the speed of the machinery and pulley was sufficiently diminished, the plaintiff attempted to put the belt on the pulley and was injured, he cannot recover."

There again, just as in the preceding prayer, the defendant sought to obtain from the Court a ruling that the enumerated facts constituted negligence on his part, so that he was absolutely precluded. The Court qualified it only with this provision: "Although knowing or having reason, from his experience, to know the necessity of waiting therefor."

The Court said that if he knew or had reason to know the necessity of waiting for the slowing down of the engine, and then, with that knowledge, either direct or imputed, he rashly threw himself into danger, he must take the consequences of it. As a matter of law, the Court could not say that the mere call of the engineer to him to wait, imputed to him information of a danger, and threw upon him the whole responsibility, but left it to the jury to determine, from all the circumstances, whether or not the language of the engineer was a sufficient warning of danger; and we think the Court was entirely correct in submitting to the jury whether those words from the engineer did impart to him a sufficient warning so as to make him responsible thereafter for the consequences which might happen.

None of the other prayers seem to require comment. They are just in the line of the imperfections which have already been noted, and they were rightfully refused *in toto* or qualified in a manner similar to the qualifications which I have just adverted to.

Under all the circumstances of the case, the Court is of the opinion that no error was committed to the detriment of the defendant in this case; but if there was any, it was in too great an indulgence and relaxation of the law in its favor.

The judgment below must stand.

Supreme Court of the United States.

OCTOBER TERM, 1889.

WASHINGTON AND GEORGETOWN RAILROAD CO.,
Plaintiff in Error,
vs.
LEWIS H. McDADE.

No. 137.

Brief for Plaintiff in Error.

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No. 137.

Brief for Plaintiff in Error.

This is an action to recover damages for personal injuries caused to an employee by being accidentally caught while endeavoring to put a belt on a revolving pulley operated by steam, in the blacksmith-shop of the defendant, in Georgetown in this District. The accident occurred on Monday the 5th day of February, 1883; the action was instituted January 16th, 1884, and it resulted in a verdict and a judgment for the plaintiff for $6,195.00. This judgment was affirmed by the General Term of the District Court and the defendant sued out this writ of error.

The defendant company operates a machine shop, constructed of brick and two stories high,

divided into many compartments; one of these is a blacksmith-shop. The machinery used in the several compartments is propelled by an engine from which motion is communicated by means of shafts, pulleys and belts. This shop was erected in 1879, for the purpose of building and repairing cars, and for other purposes connected with the defendant's street railroad (15).

On, or about, the first of April, 1881, the plaintiff was employed as assistant blacksmith, under one Eckrit, who was chief blacksmith for the defendant, and worked at the same forge with Eckrit. The fan which created the blast for this forge was propelled by means of an upright belt on a fixed pulley, thirty inches in diameter on a horizontal counter-shaft, about twelve feet above the floor and near the partition wall between the blacksmith-shop and the engine-room. This pulley revolved, when the machinery was in motion, at the rate of about 180 revolutions in a minute. Eckrit remained at work there with the plaintiff, between four and six months, and always put this belt on the pulley whenever it became necessary, except when taken off for repairs, and the plaintiff saw him put the belt on. When Eckrit left, the plaintiff was promoted to be chief blacksmith in Eckrit's stead, and was told to take the place of Eckrit, and he did so. He continued in charge of the work in the blacksmith shop as chief blacksmith until the time of the accident, a period of about eighteen months. The belt, above mentioned, was not thrown off except when the forge was to stand still and the machinery in the other parts of the building was to be used; when the belt was off, the plaintiff always, during these eighteen months, put it on, and the

plaintiff's testimony showed that the belt was thrown off, on an average, once a week during this period, and that the plaintiff always put it on, except occasionally, when it was taken off for repairs. In order to put the belt on the plaintiff mounted a ladder about twelve feet long, which rested at the top against the partition wall between the engine-room and blacksmith-shop.

On the morning of the 5th of February, 1883, the plaintiff found the belt off and the machinery in motion; he ascended the ladder and tried to put it on, but it jumped over the pulley. He then descended and went into the engine-room, adjoining, and told Kline, the engineer, *that there was something wrong with the belt*. Kline went up and attempted to put the belt on, but failed, also. He then descended and said to the plaintiff (30), "Hold up until I shut down," and ran into the engine-room, to the engine, a distance of about twenty-five feet, and "shut off" the steam; but as soon as Kline left him, the plaintiff, notwithstanding the warning given him by Kline, again went up the ladder, and, without waiting for the speed of the revolving pulley to subside, rashly attempted to put the belt on, and was caught and injured. Kline was the engineer in charge of the engine in the adjoining room and had nothing to do with the belts; he had no duties beyond the engine-room (15). Kline swears that after he had made the unsuccessful attempt to put on the belt for McDade, he came down the ladder, where McDade was standing, and said to McDade: "Hold up until I shut down" (26, 27,); that he then ran into the engine-room and entirely shut off the steam; that owing to the momentum the fly-wheel made, as it always does, about

twelve revolutions before the speed began to subside or diminish (27). The plaintiff in his own testimony says the words used by Kline were these (36, 37,): "Go up and put it on whilst I slow up the engine," or, "go up the ladder, put the belt on and I will slow up the engine." But he says (37, 38), he understood from this that Kline was to slow up the engine *to enable him to put on the belt*. He also says that he waited until he thought the engine had "slowed up" enough before he undertook to put on the belt; that he exercised his judgment in the matter and acted accordingly.

The defendant had in its employment at the shop, Edwin Moore, the miller of the establishment, who had had an experience of more than twenty years with belts, and was in all respects skillful and competent; he was specially charged with the duty of attending to and repairing and taking off and putting on the belts connected with the machinery; his duty was not confined to repairing and taking off belts for the purpose of repair and then putting them on, but he had charge generally of the belts, as was known alike to the plaintiff and other employees; Morgan, who worked in the same shop with plaintiff, always called on Moore to put on his belt, and on several occasions, the last in January before the accident, the plaintiff did the same thing.

According to the plaintiff's own estimate, he put this belt on at least seventy-eight times before he was injured, and he must have been perfectly acquainted with it. He was about fifty-one years of age, at the time of the accident, and was a man of much more than ordinary intelligence. There is always more or less danger attending the act of put-

ting a belt on a pulley when in motion; when the pulley is at a "stand still," it is very difficult to put the belt on; the motion of the pulley aids the effort to put the belt on. A boy of ordinary brightness will learn to put such a belt on in a day, by being shown how to do it two or three times. In some shops boys are employed to perform this work. (17.)

On the Saturday preceeding the accident, at about four, when work in the blacksmith shop was about to stop, the foreman went to the blacksmith shop and found there the plaintiff and his helper Parsons, since deceased, and addressing them both said that the engine would run after working hours, and the belt would be thrown off, and that on Monday, Moore should be called, when the bell rang, to put on the belt; the foreman was induced to give these directions because he knew that on Friday, the day before, the belt had been taken off and repaired by Moore (16.)

One of the grounds upon which the plaintiff relied on the trial, and one which was steadily held up to the jury by the court, was that *the plaintiff did not know that there was any danger connected with or involved in the act of putting on this belt when the pulley was revolving at a high rate of speed.*

The following extraordinary testimony was given by the plaintiff himself on the trial (35) to wit:

"Q. Now, Mr. McDade, you are a man of ordinary observation, are you not?

A. I presume so.

Q. No doubt of it?

A. I presume so.

Q. You know what danger is, as well as any other man, do you not?

A. Well, of course I know what danger is. I ought to know.

Q. You ought to know. You have as fine a sense of danger as the generality of men?

A. I know more now than I would then.

Q. I am speaking now.

A. *I didn't know that there was any more danger in putting on that belting than there was for me to pick up a hammer and hit a piece of iron with it.*

Q. Do you mean to say that?

A. Yes, sir.

Q. You knew the revolutions of that wheel, did you not?

A. No, sir.

Q. You didn't know how many times it went around in a minute?

A. No, sir.

Q. But you knew it revolved?

A. Yes, sir.

Q. Did you not know that it revolved very rapidly?

A. I knew it revolved right fast.

Q. *And you state that after an experince of eighteen months, you supposed that there was no more danger in attempting to put on a belt than in picking up a hammer on the floor*

A. *I did not know that there was a bit more danger.*

Q. Then it would appear that you are not as much alive to danger as the generality of men?

A. That might be.

It is not pretended that any of the machinery was defective or out of repair at the time of the accident. The plaintiff also relies for his cause of action upon the assertion that the machinery was not the best kind; that since the accident he has discovered or conceived of a better kind, and that there was a well-known device called a "shifter," used in connection with a fast and loose pulley, which might have been used, and which would have obviated the necessity

of going up the ladder and coming in contact with this pulley, whilst revolving at so dangerous a rate of speed; proof was offered by the plaintiff to show that this device was well known. The defendant on the other hand showed that the machinery in the shop was of the best kind, and the most appropriate for such works, and that a "shifter," with the fast and loose pulleys, was used only where the power was to be applied and cut off at very short intervals, and not where the power, as here, was to be detached only periodically, *i. e.* on Saturdays, or when some unusual occurrence intervened to render it proper.

Assignment of Errors.

The court erred during the trial of the cause in the manner following, to wit:

1. By refusing to direct the jury to return a verdict in favor of the defendant as requested by counsel for the defendant;

2. By refusing to instruct the jury, as requested, that if they found that it was no part of the plaintiff's duty to put the belt on the pulley, and that notwithstanding, he voluntarily undertook so to do and was injured in the attempt, that then he was not entitled to recover;

3. By refusing to instruct the jury as requested (42, 49), that if the machinery in the blacksmith-shop was reasonably well adapted to the accomplishment of the work to be done, and such as a reasonably prudent person would select for the purpose; and that it was kept by the defendant in reasonably good order and condition and was in reasonably

good order and condition, at the time of the accident, the defendant is not liable for the injury to the plaintiff, and the verdict must be for the defendant, and by instructing the jury in lieu thereof to the effect that the defendant was bound to use and employ such machinery only "*as the experience of trade and manufacture sanctioned as reasonable and safe* (48);"

4. By refusing to instruct the jury that if the plaintiff was in the habit of putting the belt on the pulley, during the period of ten or twelve or fifteen months, as a part of his duty, and that at the time of the accident, there was substantially no more danger in so putting the belt on the pulley than when he first began to put it on, the plaintiff can not recover, and the verdict must be for the defendant (42);

5. By refusing to instruct the jury as prayed by the defendant's counsel (exceptions No. 5 and No. 10, pp. 42 and 44), to the effect that if the defendant employed a man whose duty it was to put on the belts, then the plaintiff had no right to attempt to put this one on, and consequently could not recover;

6. By submitting to the jury the question whether or not the plaintiff *knew* that it was dangerous to put on the belt under the circumstances existing at the time of the injury, as the court did in the modifications and changes made in the instructions asked for by defendant's counsel and reserved and shown in the eleventh, twelfth, thirteenth, fourteenth, fifteenth, seventeenth, eighteenth, and twentieth exceptions of the plaintiff (pp. 45, 46, 47, 48, 49), and also by refusing such instructions in the form in

which they were asked, and by giving them as altered;

7. By refusing to instruct the jury that if the failure of the plaintiff to wait until Kline had slowed the engine sufficiently to enable the plaintiff to put on the belt contributed to the injury, the plaintiff could not recover (49.)

Points and Authorities.

The plaintiff's evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, and the court erred in refusing to direct the jury to return a verdict for the defendant.

Randall vs. *B. & O. R. R. Co.*, 109 U. S., 478.

The part of the machinery, which caused the accident, was not out of order, and there was no evidence to show that it ever had been out of order. It had been in use then for nearly four years, and no one was ever injured by it before, and no complaints had ever been made that it was unusually dangerous, either by the plaintiff or anyone else. It was efficient in performing the service desired. The devices were perfect in themselves; no defects existed either latent or patent. The plaintiff engaged in his employment to put on this belt; he had seen his predecessor do it several times, and he had steadily performed the act, whenever it was unusually necessary, for about eighteen months. Moore, the expert, says that to put on such a belt does not require a great deal of skill (17). A bright boy could learn to put on such a belt in a day (17). Considered in the most favorable light for the plain-

tiff this injury was the result of an accident, incident to the service in which he was engaged. Nobody could ever expect such an accident to happen. It is not very clear from the evidence how it did happen. The account given of the manner in which it happened, by the plaintiff's testimony, is not at all satisfactory. The statement is (12) that the plaintiff went up the ladder and put the belt on the pulley in the way he had usually done before, but the belt was thrown off towards and against him and formed a loop which caught the set screw and wound around the counter-shaft, and drew the left arm of the plaintiff in between the belt and the countershaft, crushing and tearing it. How the belt could form such a loop as would catch and hold on to the "set screw," is not quite plain. The head of this "set screw" projected only about one-and-a-half inches above the hub of the pulley, which would be a very "short" hold. That part of the machinery which wrought the injury is described in the plaintiff's testimony, as follows: (11.)

> "The pulley on which ran the belt for the plaintiff's forge was about twelve feet above the floor, and in order to put the belt on, it was necessary to use a ladder ten or twelve feet long, placed against the partition wall, and when he went up the ladder his back might have touched the shaft and the face of the pulley was nearer the wall than his face; when he tried to put on the belt he turned his face round putting on belt when injured as he had always done; that the ladder was not stationary which was there when he was employed and remained while he did; and that the counter-shaft was about thirty inches from said wall, and the pulley for plaintiff's forge was about fifteen inches from the

wall, and the counter-shaft was about three and one-half or four inches in diameter; that the said pulley was fastened to the counter-shaft by a set screw running through the hub of the pulley to the counter-shaft, and the head projected about an inch and a half above the hub."

It could not be expected that the plaintiff could, if he would, give a very accurate account of the manner in which the accident happened; and there is no other person in existence who witnessed the accident. If the truth could be known it would probably appear that the plaintiff's feet, or one of his feet, slipped, and that to sustain himself on the ladder, he threw his arm against the revolving shaft. Such an accident could not have been expected and was not likely to happen. The like never happened before in this shop, and is not likely ever to happen again. The defendant was clearly free from negligence.

But, in addition to these considerations, the defendant was not without fault. He discovered what he supposed to be something unusual connected with the belt, and, instead of sending for Moore who was the expert whose duty it was to see that all the belts were in order, he called to Kline, who, in his duties, had nothing to do with belts. He said to Kline that there "*was something wrong with the belt.*" This was enough to have put him on his inquiry, and if he thought there was "something wrong with the belt," it was his duty to give notice to the master or to its representative, Moore; failing to do this was such negligence as will defeat his claim for damages. But there was more than this: Kline came to his assistance, and after himself trying unsuccessfully to put the belt on the pully, he told the plain-

tiff to "hold up" until he should shut off the steam, and immediately ran to the engine and did shut off the steam. Had the plaintiff waited for the effect of this to reach the shaft he could not have been injured. But he waited only a moment and then with the speed of the revolving pulley undiminished or reduced very little, if any, he again undertook to put on the belt and was injured. This was negligence on his part. He was bound to wait. He exercised his own judgment and acted upon it, as he says himself (38). He took this chance at his own risk and peril. His employer was not in fault; it was not there and had no representative there.

There was not a syllable of evidence to show negligence on the part of the defendant. It is submitted that upon all the proofs and all the fair inferences the plaintiff could not recover.

Upon this state of facts it is argued in behalf of the plaintiff below: 1. That some device extraneous or in addition to the devices used by the defendant would have been safer, and that the defendant is therefore chargeable with negligence because it did not supply such devices:

2. That the plaintiff *did not know* that it was dangerous to undertake to put this belt on the pulley under such circumstances.

The following cases are applicable to the first branch of this argument:

In the case of *Schroeder* vs. *Mich. Car Co.*, 56 Mich., 132, a workman caught his sleeve in the exposed cogs of an ordinary planing machine, and hurt his hand. He had run the machine for only a

day or two, but he had worked within a few feet of it for two years and more, and among similar machinery for twenty five years. *Held*, that the injury was accidental, and the workman, who must have been familiar with the machine, could not recover on the ground that his employer was negligent in setting him to work at it without having the cogs covered. COOLEY, C. J., in delivering the opinion of the court, says:

> "Had the machine been constructed with a shield over the cogwheels, this particular accident would probably not have occurred; and any one whose attention was drawn to the danger of such accidents would probably have perceived the desirability of such a shield. * * * *
>
> "But the fact of injury, and the possibility of guarding against it, do not necessarily make out a case of culpable negligence: very few acts in life are done with such care to prevent accidents as would have been possible; and the law only requires of anyone that degree of care and prudence which persons who are reasonably careful ordinarily observe. To require more would put everybody under restraints in the management of his business and in his dealings with others which would be more hurtful in the embarassments they would cause than beneficial in the protection they could give against injuries."

The case of *Richards* vs. *Rough* (53 Mich., 212) is equally as strong in favor of the defendant here. In the last mentioned case there was nothing out of order about the machine, and the sole ground upon which the claim was based was that a different kind of machine should have been selected. The court, in an elaborate opinion, rejected this claim as invalid.

In its opinion the court said:

> "At this day, when inventions of machinery are of daily occurrence, frequently a large number of different kinds are made to accomplish the same purpose, and great difference of opinion exists as to the kind best adapted to the use intended in the minds of men well skilled in their construction and use. The comparative merits of the different kinds, whether as to safety or utility, are questions most difficult to solve; and to say that it shall be left to a court or jury to determine in any given case which kind a manufacturer shall use in order to avoid liability in case of an accident to an employee while using it, would be imposing a duty upon the court and an injustice upon the party alike intolerable. A manufacturer must be permitted to choose the machinery he desires to use, and to control his business in his own way, provided he does no unlawful act. He may use new or old machinery according to his liking, and if it is sound, well made, and kept in repair he will not be liable for an accident occurring to an employee using it so long as the only cause alleged is that there is a better and safer kind of machinery used for the same purpose."

The case of *Sjogren* vs. *Hall* (Ibid., 274), closely resembles the last cited case. The accident there was one that was not likely to happen; one that even a prudent man would not be likely to anticipate.

In the case of *Gilbert* vs. *Guild* (144 Mass., 601), a youth, nineteen years of age, was employed to attend to and feed a shearing machine, used by the defendant to shear the nap off woolen cloth. The cloth passed close to a stationary knife-plate, over against which was a rotating cylinder on which were eighteen knife-blades; there was no guard over these knife-blades.

The cloth came up from the floor and passed over a rod and then over and under various rollers, and then over a brush; it moved at the rate of about two feet in three seconds. It was the duty of the boy to guide the cloth and keep it smooth, and in case of wrinkles to take them out with his right hand. He was told to look out for the knives. At the time of the accident he was endeavoring to take a fold out of the cloth and two of his fingers were cut off. It was contended by the plaintiff, and he undertook to prove, that this machinery could, and should have had guards for the protection of the person feeding it. A verdict was returned for the defendant. The case went up on a bill of exceptions and the court, in sustaining the verdict, said :

> "If it (the verdict) was founded upon the fact that the machine was not dangerous, or on the fact that the plaintiff had knowledge of the danger, it was equally immaterial that the defendants had not provided a guard; want of due care by the plaintiff, or knowledge of the danger by him * * * * would have prevented a recovery, equally, whether the defendants could or could not have guarded against the danger."

In another case, in Masachusetts, the complaint was that the owner of machinery about which the employee was working, was not protected by guards or covering, and that, in consequence, the plaintiff was injured; it was urged and proof was offered to show that the machine might readily have been, and ought to have been, so protected, and that, as a matter of fact, it was so guarded after the accident. This evidence was rejected on the trial, and the ruling of the trial court was affirmed. The court said :

> "When he assents therefore to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care, and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected."

Sullivan vs. *India Manf'g Co.*, 113 Mass., 398-9;

See *Leary* vs. *R. R. Co.*, 139 Mass., 580;
Nuttall vs. *Ship Bldg. Co.*, 119 Pa. St., 149;
Moulton vs. *Gage*, 138 Mass., 390;
Wood on M. & S., Sec. 335 and notes.

In the case of *Burke* vs. *Whitherbee* (98 N. Y. 562), the defendant owned and worked an iron mine. The ore was taken out by cars drawn on a track by a cable, to which the cars were attached by a hook. The hook accidentally became detached and the plaintiff's intestate was killed in consequence. The sole complaint made in behalf of the plaintiff was that there should have been a belt through the hook fastened with a key or some other device to fasten the hook securely. In deciding the case the court said:

> "This hook was in plain sight of the men operating the mine. They rode up and down in the car and they worked in the mine day after day, exposed to any danger which might come from a failure of the hook to perform its proper

work, while making nearly one hundred and fifty trips daily; yet none of them ever complained of it as inadequate, and, as we must infer, none of them believed it to be so. They were just as capable to judge of its safety and adequacy as the defendants, and certainly would not have exposed their lives without some protest if they had supposed there was any danger from the use of the hook. No person was ever called as a witness who ever heard any complaint or allegation anywhere before the accident that the hook was an unsafe or inefficient implement. Under such circumstance can the defendants be charged with negligence? Were they bound to know more than every one else? Ought they to have perceived danger that was not visible to any one else, and which those whose lives were most exposed were not sufficiently wise or vigilant to foresee?

It is a mistake for one to take his stand after an accident and to impute responsibility from a view thus obtained. It is nearly always easy after an accident has happened to see how it could have been avoided. But taking our stand before this accident, the very first of its kind, so far as we know, that ever occurred, we can, upon the facts of this case, see no ground for imputing against the defendants the want of that ordinary care, dilligence and foresight which they, as employers, owed to the men in their service."

The case of *Shaw* vs. *Sheldon*, 103 N. Y., 665, is a case where the employee was killed in the rolling mill of the defendant; he stepped on an uncovered iron tub called a "bosh," in the vicinity of the rollers, and slipping off, one foot and leg passed between the revolving coupling, causing the injuries of which he died.

The court said:

"The majority of the court are of opinion that this judgment should be reversed for the reason that the facts establish beyond dispute that the injured employee entered the service and remained in it with a full knowledge and appreciation of the risk and danger resulting from leaving the couplings uncovered. The fact was entirely obvious, the resultant peril plain at a glance, and the injured servant, a skilled workman, a foreman of the rollers, accustomed to the machinery and the service, and having the capacity and ability to fully appreciate the consequences of leaving the couplings uncovered. Within the rule applicable to such cases, the plaintiff's intestate took upon himself the risk of injury from the observed and obvious omission."

In *Kelley* vs. *Silver Spring Co.*, (12 R. I., 112; 34 Am. R., 615.,) it was held that when an employer has kept imperfect and unsound machinery in use for a long time, and it has been safely used by his employees, he is not liable in damages for an injury to one of them, occasioned by its unfitness.

See also:

Sullivan vs. *India Mfg Co.*, 113 Mass., 396.
Schroeder vs. *Mich., Car Co.*, 56 Mich., 132.

See also:

Smithson vs. *R. R. Co.*, 45 Mich., 212.
Wachter vs. *R. R. Co.*, 60 Md., 395.
O'Rorke vs. *R. R. Co.*, 22 Fed., 189.

The case of *Sweeney* vs. *Berlin Co.*, 101 N. Y., 520, was as follows:

Plaintiff, a servant in defendant's employ, was injured by a machine, at which he was working, and

which was held in check by pressing his foot upon a pedal. While working the machine his foot slipped from the pedal, the machine suddenly started and his hand was caught and crushed. Plaintiff charged negligence on the part of the defendant for not providing a clutch or some contrivance other than the pedal to hold the machine in check; and he testified that before the accident he had called the defendant's attention to the danger, and requested a change or improvement in that respect, and that he was promised by the machinist that the matter should be attended to as soon as he had time. The proposed "clutch" was not to be connected with the pedal; it was intended to put the machine in motion while the "pedal" was used to stop it. The court of appeals of New York held that the defendant was not liable, and that the trial court erred in submitting the case to the jury. In the opinion, the court says:

> "It is plain that the danger, to the knowledge of the plaintiff, was inherent in the use of the machine, and to the work itself; the peril did not grow out of extrinsic causes or circumstances which could not be discovered by the use of ordinary precaution, nor to a condition of things different from those existing at the beginning of the service. It was part of the plaintiff's engagement that the master's work should be performed in the usual course and way of business. The work which the servant was called upon to do at the time in question was not of a different character from that which he originally undertook; the machine upon which it was to be done was one then in use. No new duty or species of labor was imposed upon him, nor was he required to work a machine with which he was not familiar. He was simply called upon to do that

for which he was engaged, and the doing of which formed the consideration of his employment. To say that the master shall be liable to the servant in such a case, is to say that he shall not have the benefit of the labor for which he contracted. Such is not the law. The defendant might, if he chose, carry on his business with an old rather than a new machine, and could not be required to keep in his employ, a servant who would not run it. He might therefore call upon the servant to perform his stipulated service, and discharge him if it was withheld. A threat to do so is not coercion. Here there was nothing more. Under such circumstances there is no ground for charging the defendant with negligence, or throwing upon it a risk assumed by the plaintiff when he took employment."

As to the second branch of the argument. It is not sufficient for the purposes of a cause that an intelligent, experienced man, beyond middle life, with all his faculties unimpaired, should swear that he did not know that such a shaft and wheel revolving at a high rate of speed, was dangerous. Such a story, in the nature of things, can not be true. "All machinery is dangerous to a greater or less extent, and particularly when operated by steam." (*Richards* vs. *Rough*). The case of *Artz* vs. *R. R. Co.*, (34 Iowa 154), is in point. In that case it appeared that for a distance of at least 660 feet before reaching the crossing the plaintiff had an unobstructed view of the track and trains for at least 1,010 feet; that the distance of view increased as the crossing was approached; that plaintiff was familiar with the locality; the train was on time, and the headlight burning, it being about nine o'clock in the evening. And the court said:

"This being true, we hold as a matter of law, that the plaintiff cannot recover, since his own negligence must have directly contributed to the injury. But it is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not, and that this testimony shows that he was not guilty of contributory negligence, or, at the very least, it made it a question of fact for the jury. The difficulty, however, with the position is, that the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be also true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness, having good eyes, should testify that at the time he looked and did not see it shine; could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself first believe it was so, and this belief may have ripened into a conviction of its verity; and possibly he even may testify to it in the self-consciousness of integrity; but after all, in the very nature of things, it can not be true, and hence can not, in the law, form any basis for a conflict upon which to rest a verdict. A man may possibly think he sees an object which has no existence in fact, but which it may be difficult, if not impossible, to prove did not exist or was not seen. But an object and power of sight being conceded, the one may not negative the other."

See also *Baxter* vs. *R. R. Co.* (41 N. Y. 505);
Wood on M. and S. Sec. 347.

The court, in submitting to the jury, as was done, the question whether the plaintiff did or did not know

or comprehend the danger of his undertaking, committed error.

The defendant had no means of obtaining information of imperfections or accidental breakages, except through the plaintiff. He was employed in immediate connection with this machinery, and should have discovered any infirmities when they occurred, and was bound to inform his employer. Where the means of information of the employee are *equal* or *greater* than those of the employer as to imperfections in machinery, the employer will not be responsible for an injury resulting from such imperfections.

Beach on Con. Neg., 363, § 132;
Mad. River R. R. vs. *Barber*, 5 Ohio St., 441;
Ga. R. R. Co. vs. *Kenney*, 58 Ga., 584;
Jones vs. *Phillip*, 39 Ark., 43 Am. R., 264.

When the servant discovers that the machinery, tools, or the like, are unsafe or unfit, or that a fellow servant is careless or incompetent, and nevertheless continues in the employment without protest or complaint, he assumes the risk of the danger and waives all claims for damages.

Beach on Con. Neg., 371, § 140;
O'Rorke vs. *R. R. Co.*, 22 Fed. Rep., 189, (1884);
Hough vs. *R. R. Co.*, 101 U. S., p. 224;
Kelley vs. *Silver Spring Co.*, 12 R. I., 112;
Rough vs. *Richard*, 53 Mich., 212;
Sjorgsen vs. *Hall*, 53 Mich., 274;
Dorsey vs. *Phillips*, 42 Wis., 583;
Dillon vs. *U. P. R. R.*, 3 Dill., 319;
Shearman & R. on Neg., pp. 118, 119, and 120, §§ 94, 95;
Kielly vs. *Belcher S. M. Co.*, 3 Saw., 500;
Randall vs. *B. & O. R. R.*, 109 U. S., 478.

Proof of Notice to Employer Necessary.

Even if this machinery had suddenly developed an infirmity, the defendant cannot be held guilty of negligence, without proof of notice or knowledge of the infirmity. To charge the defendant it is essential to show knowledge, or that knowledge might have been obtained by the use of reasonable diligence, of the defect. Without this there can be no recovery.

Allen vs. *New Gas Co.*, 1 Exch. Div. L. R., 251;
Hightower vs. *R. R. Co.*, 92 Ill., 139;
Platt vs. *R. R. Co.*, 89 Ill., 141;
Dewey vs. *R. R. Co.*, 31 Iowa, 374;
Tierney vs. *R. R. Co.*, 33 Minn. 311;
Barber vs. *R. R. Co.*, 5 Ohio St., 564;
2 Rorer on Railroads, p. 1200 and 1201 (note);
Painton vs. *N. C. R. R. Co.*, 83 N. Y., 7;
DeGraff vs. *R. R. Co.*, 76 N. Y., 125.

Only Ordinary Care as to Machinery Necessary.

The trial court instructed the jury (48) that the defendant had a right to use and employ only such machinery and devices as "the *experience of trade and manufacture sanctioned as reasonably safe.*" This was an erroneous statement of the law, and, furthermore, the language was wholly inapplicable to the case. How could the jury in this case determine what the experience of "trade" had sanctioned? How could they say what the experience of "manufacture" had sanctioned or what the experience of the two together had sanctioned? There was no evidence from which the jury could ascertain the teachings of either "trade" or "manufacture,"

as to the comparative merits of mechanical devices. This record does not make it quite clear what was meant by the learned judge when he used the words "experience of trade and manufacture." Trade is defined to be "the business of exchanging commodities by barter; the business of buying and selling for money." (Webster.) How "trade" can enlighten the subject of selecting machinery for a blacksmith-shop it is difficult to understand. Persons engaged in trade will buy any kind of machinery they can barter or sell again at a profit; but it does not follow that because more of one kind of machines are sold than of another that the former is the best. There being no evidence on this point in the case, the effect of this language on the minds of the jury can only be conjectured. But it is reasonably certain that the effect could not have been in favor of the defendant.

No authority for the support of the rule laid down by the trial court can be found. Such a test is unknown in the judicial writings on this subject. The rule applicable to machinery of this kind is elaborately laid down by the supreme court of Michigan, in *Richards* vs. *Rough*, 53 Mich., 212, before cited, and the rule as there stated is sanctioned by this court in *Tuttle* vs. *R. R.*, 122 U. S., 194. The rule may be stated thus:

The master must furnish safe and reasonably good machinery to his servant and keep it in reasonably good order, *i. e.*, he must exercise ordinary care. He is not bound to make use of the safest appliances and instruments, nor to change his machinery with every new invention, nor to introduce every sup-

posed improvement in his appliances. He must have *good*, but not the *best* machinery. He is not bound to throw away his old machinery and buy new.

Beach on Con. Neg., 354, § 125;
Warder vs. *Balt. R. R. Co.*, 32 Md., 411.
Jones vs. *Granite Mills*, 126 Mass., 84.
Keith vs. *Granite Mills*, 126 Mass., 90.
Ft. Wayne vs. *Gildersleeve*, 33 Mich., 133 and 256;
Burth vs. *Wetherbee*, 98 N. Y., 562;
Leonard vs. *Collins*, 70 N. Y., 90;
Ladd vs. *N. B. R. R.*, 119 Mass., 412;
Kelly vs. *Silver Spring Co.*, 12 R. I., 112; 34 Am. R. 615;
Wood on M. & S., sec. 326.

It can hardly require the citation of authorities to sustain the doctrine that in case an employee goes outside of the scope of his employment and voluntarily undertakes to do that which it is no part of his duty to do, and is injured, he can not hold the employer liable. The court refused to instruct the jury to this effect (41). It was insisted by the plaintiff (32, 33) that he did not know whether this work of putting on the belt was a part of his duty or not. He says he assumed this duty "because he saw Eckrit do it" (11); but the defendant asserts that it kept a man (Moore) whose duty it was to put on the belts as well as to repair them. But it is immaterial, however the fact may be. The plaintiff conceived that this work was a part of his duty and he assumed it as such. If it was not his duty and he volunteered to perform it, he cannot recover.

Crew vs. *R. R. Co.*, 20 Fed. R., 87;

Johnson vs. *Armour & Co.*, 18 Fed. R., 490; Wood on M. & S., sec. 331.

The court refused to instruct the jury, on the request of defendant's counsel, that if the failure of the plaintiff to wait until Kline had "slowed" the engine sufficiently to enable the plaintiff to fix the belt, contributed to the injury, the plaintiff cannot recover (49). This was error.

It is submitted that the judgment of the supreme court of the District of Columbia should be reversed.

ENOCH TOTTEN,
Attorney for Plaintiff in Error.

W. D. DAVIDGE,
Counsel.

FILED
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Supreme Court of the United States.

OCTOBER TERM, 1889.

WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Plaintiff in Error,*

vs.

LEWIS H. McDADE.

No. 137.

Brief for Plaintiff in Error on Motions to Strike Out Bill of Exceptions and to Dismiss Writ of Error.

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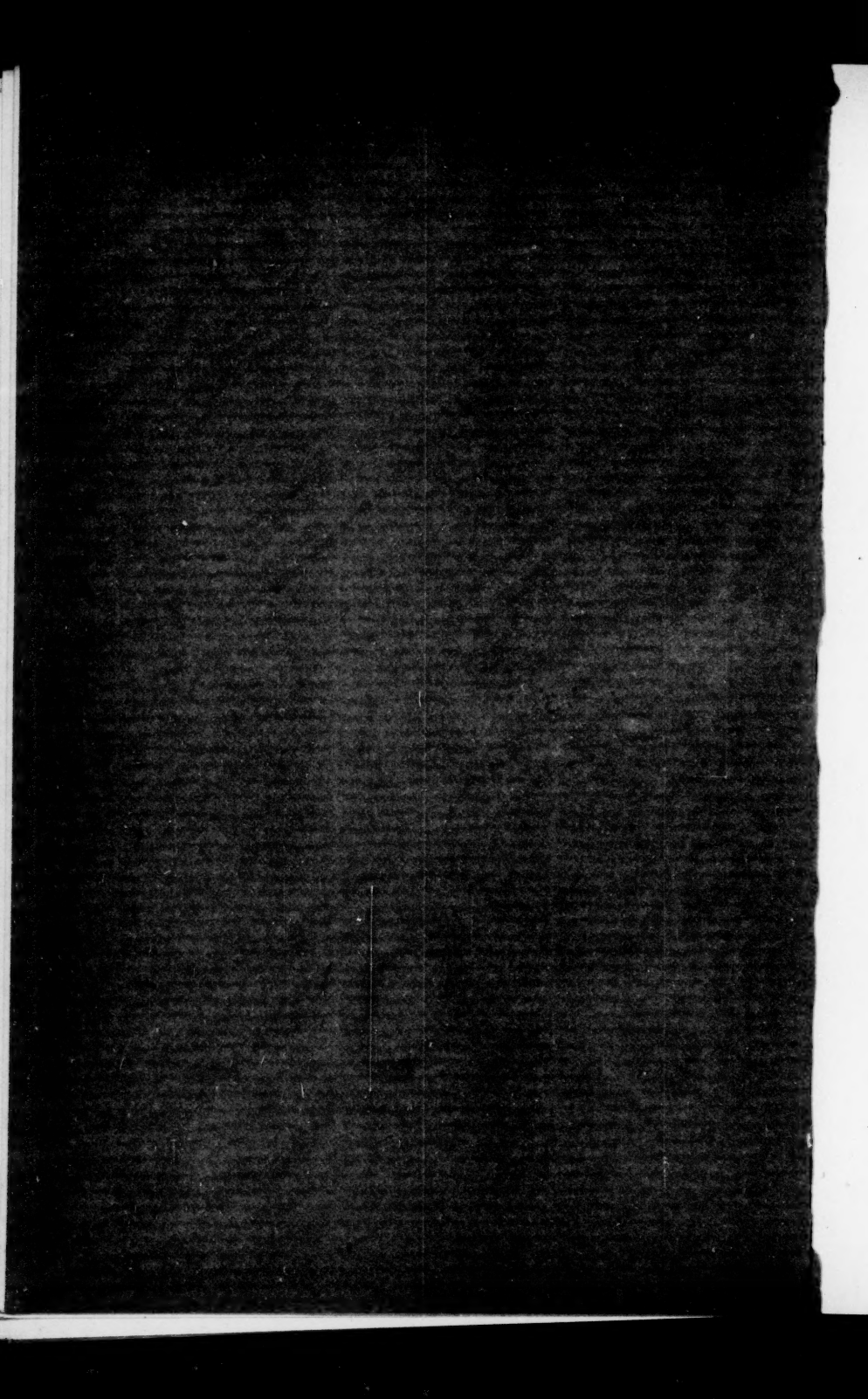

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These motions are based upon the assumption of counsel that the rules and statutes relating to practice and proceedings prescribed for the Supreme Court of the District of Columbia, have not been complied with in this case and that therefore the case was not properly before the General Term of that court and is not properly here. The answer to such objections is :

First. The rules of practice and proceeding relating to the manner of securing the review of a judgment of a special term in the general term do not govern the manner of bringing a cause for the purpose of the review of such judgment on writ of error in this court, and

Second. The course pursued was in compliance with the rules of practice and proceedings in said court.

I.

The rules of court and the statutes adopted and made to govern the practice and proceedings in the Supreme Court of the District of Columbia have no application to the manner of obtaining a review of a cause in this court by means of a writ of error to that court.

The statutory provisions relating to the re-examination in this court of judgments, orders, or decrees of that court are contained in Section 846 of the Revised Statutes, relating to the District of Columbia, which are in the following words :

> "Any final judgment, order, or decree of the Supreme Court of the District may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the Circuit Courts of the United States." (R. S. D. C., Sec. 846.)

This section is identical in terms with the eleventh section of the act of March 3, 1863, establishing the Supreme Court of the District of Columbia, except that the section last mentioned, adds to the above section the four words, "for the District of Columbia." But these words do not change the effect of the statute, as the proceedings in error or appeal from

judgments or decrees of that Circuit Court were regulated in the same way. (*Thompson* vs. *Riggs*, 5 Wall., 677.)

In cases from a Circuit Court of the United States, where it is desired to have reviewed the rulings of the trial court, as to admitting or rejecting evidence, or as to instructing or refusing to instruct the jury, there must be a bill of exceptions. In no other way can such a cause be reviewed here. And the bill of exceptions must conform to the statute of Westminster, and the other regulations governing the practice, in this particular, in the circuit courts. The lower court could not if it would regulate the manner of bringing causes to this court for review.

Thompson vs. *Riggs*, 5 Wall., 675.

The manner of settling bills of exceptions and the time within which it shall be done depend upon the rules of court and the judicial discretion of the presiding justice, and the rules of court will be disregarded in the interest of justice. Such rules are merely directory.

This court has repeatedly declared that the time within which the bill of exceptions shall be presented rests in the discretion of the presiding judge, and he, and he alone, is to determine what is a reasonable time for such presentation.

Hunnicut vs. *Peyton*, 102 U. S., 354;
U. S. vs. *Breitling*, 20 How., 252;
Stanton vs. *Embrey*, 93 U. S., 548;
Dredge vs. *Forsyth*, 2 Black., 564;
Philips vs. *Mayer*, 15 How., 160;
Turner vs. *Yates*, 16 How., 28.

This court, speaking through TANEY, *C. J.*, declared that it "is always in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it."

U. S. vs. *Breitling*, 20 How., 354;
See *Hunnicut* vs. *Peyton*, 102 U. S., 358;
Embrey vs. *Stanton*, 93 U. S., 548.

In *Dredge* vs. *Forsyth*, 2 Black., 568, it is said:

> "It is always allowable, if the exception be seasonably taken and reserved, that it may be drawn out and sealed by the judge afterwards, and the time within which it may be so drawn out and presented to the court must depend upon the rules and practice of the court and the judicial *discretion of the presiding justice.*".

In *U. S.* vs. *Breitling*, 20 How., 252, the rule of the Circuit Court provided that no bill of exceptions could be signed after the adjournment "unless by consent of counsel in writing." * * * The court in deciding the question said:

> "It is always in the power of the court to suspend its own rules or to except a particular case from its operation whenever the purposes of justice require it. * * * The time within which it (the exception) may be drawn out and presented to the court must depend upon its own rules and practice and on its own *judicial discretion*. In the case before us the judge who tried the case has deemed it his duty to seal and certify the exceptions to this court, and, under the circumstances stated, we think he was right in doing so, and that the exception is legally before the court, and a part of the record."

In *Walton* vs. *U. S.*, 9 Wh. 657, it is said: "It will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty, and it may afterwards, according to the rulings of the court, be reduced to form and signed by the judge, and so, in fact, is the general practice."

In *Turner* vs. *Yates*, 16 How., the court, says further:

> * * * "The record must show that the exception was taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held."

In *Stanton* vs. *Embrey*, 93 U. S., 548, at page 554, the court said:

> "Attempt is also made to maintain that the allowance of the bill of exceptions is irregular and the same is not before the court. * * * Beyond doubt (page 555) the record must show expressly or impliedly that the exception was taken and reserved by the party at the trial, but it is a mistake to suppose that they must be drawn out and signed and sealed by the judge before the jury retire from the bar. * * * On the contrary, it was always allowed if the exception is seasonably taken and reserved, that it may afterwards be put in form and filed in the case pursuant to the order and direction of the justice who presided at the trial. Apply that rule to the case before the court, and it is clear that the objection of the defendant in error is without merit, as it appears by the record that the objections were taken at the trial of the cause, and that the bill of exceptions was signed by the judge at the request of the defendants and filed in the

> case *nunc pro tunc*, which brings the case within the settled practice of courts of error, even if governed by the strictest rules of the common law."

In *Hunnicut* vs. *Peyton*, 102 U. S., 333, an objection was made against considering the bills of exception at all. The verdict was rendered on February 17, 1877; judgment on the same day. On the 19th, a motion was made for a new trial, which was overruled on the 20th. On the 24th a writ of error was sued out, and the bill of exceptions was signed on February 28th, and filed on March 1.

The plaintiffs' counsel objected that the bills of exceptions were not presented for signature within the time limited by the rule, which provided:

> "No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial."

On March 1, twelve days after the close of the trial, an order was made extending the time for filing the bill unto that day, the plaintiffs objecting and the bill was then filed. The court said, page 353:

> "The rule requiring the presentation of bills for the signature of the judge within five days, is not a rule which controls his action, he may depart from it in order to effectuate justice. It is a *direction to the parties* and it expressly reserves the power to enlarge the time. It is, no doubt, necessary that exceptions should be taken and at least noted before the rendition of the verdict; but the reduction of the bills to form and the signature of the judge to the bills required for their attestation, or, as was said in the

> statute of Westminster, for a testimony, may be afterwards during the term; * * * for this reason it has always been held that the exception need only be noted at the time it is made, and may be reduced to form within a reasonable time after the trial is over. The time within which the signature of the judge must be applied for, if within the term, is left to the discretion of the judge who noted the exception when it was made. It is true a judge cannot be permitted to make up a statement of facts after the writ of error is issued, upon which the case shall be heard. That is quite a different matter. But when the exception has been taken at the trial and noted, reducing the exception to form afterwards, and attesting it, is not making a new case; it is merely verifying the case as it appeared on the trial. * * * If it be kept in mind that the judge's signature is required only for 'testimony' that the exception was taken at the trial and before verdict, it cannot be material that the 'testimony' was given at the close of the trial, if given during the term."

In *Ex parte Crane*, 5 *Peters*, 199, the court said that at common law a writ of error lay only for errors apparent on the record. To remedy that defect the party had a right to require the court to settle a bill of exceptions and thereby bring up other errors of law for review. "This bill of exceptions is in the nature of an appeal," but it brings only the question excepted to.

Ex-parte Bradstreet, 7 Pet., 634, *Life Insurance Co.* vs. *Wilson*, 8 Pet., 291, *Chateaugay Iron Co's case*, 128 U. S., 544, are all cases in which it was held that a mandamus was the proper remedy to compel the signing of a bill of exceptions.

In the case of the Chateaugay Iron Company (128 U. S., 544) the verdict and judgment were rendered against the defendant on the 25th of January, 1888, and an order was made and entered allowing the defendant forty days within which to prepare and serve a "case" with leave to "turn the same into a bill of exceptions." This extension of time expired March 5, *and within the term*. On the 3d of March, a proposed bill of exceptions was served on counsel for the plaintiff, and it was by them accepted and retained. On the 13th of March, plaintiff's counsel applied to the defendant's counsel for ten days additional time to prepare and serve amendments, which application was granted, and a stipulation to that effect was signed by defendant's counsel. March 23, the plaintiff's counsel served on the counsel for the defendant seventy-seven proposed amendments; some of these were agreed to and some were not. March 27, the defendant's counsel notified counsel for plaintiff that they would present the proposed bill of exceptions and proposed amendments to the trial judge on the 10th of April. On the 31st day of March, the term of the court, at which the cause was tried, expired. At the time appointed (April 10th) the counsel on both sides appeared before the judge, and counsel for the plaintiff objected to the settlement of the bill of exceptions on the ground that the forty days as well as the term of the court had expired, and that the judge was without jurisdiction. The judge, accordingly, refused to sign the bill of exceptions.

As it was in the case of *Coe* vs. *Morgan*, 13 Fed. R., 844, counsel appeared to have been unfamiliar with the rules of practice in the Federal courts, and were

following the rules of practice of the State courts; they had not complied with the rules of the Federal court as to settling the bill of exceptions in any respect. The term had expired and there was neither an order of court nor a formal consent of counsel allowing additional time beyond the term for settling the bill of exceptions, but the counsel for the plaintiff retained the proposed bill of exceptions six days beyond the time allowed by the rule and then asked for, and was granted by defendant's counsel ten days additional time. This court held, on an application for a mandamus to compel the judge to sign a bill of exceptions:

> "That the rights of the defendant were saved by the express order of the court made during the term and by a sufficient compliance on the part of the defendant with the rules of the circuit court, and by what must be held to have been the consent of the plaintiff." (p. 556.)

In *Teft* vs. *Windsor*, 17 Mich., 425 it was held that the judge who tried the case and before whom the exceptions were noted, could sign the bill after he had resigned his office. In *Scribner* vs. *Gay*, (5 Mich., 514), the court declared it to be the settled practice in England to allow a motion for a new trial without reference to lapse of time, where a party, by death or resignation of a judge, has lost his exception; and in the case of *The People* vs. *The Judge*, (41 Mich., 726), the trial judge having died leaving the bill of exceptions unsigned, it was held that the granting of a new trial was a matter of course.

In a Maryland case (*State* vs. *Weiskettle*, 61 Md., 48.) the term of office of the trial judge had expired,

but by virtue of a stipulation the bill of exceptions was signed and sealed by him, notwithstanding the expiration of his official life. The Court of Appeals of Maryland felt bound, notwithstanding the stipulation, to grant a new trial, although many months had elapsed.

The Court, in disposing of the case, said:

> "It is the established practice now, both in England and in this State, that when a party, without *laches* on his part, loses the benefit of his bill of exceptions by the death or illness of a judge, so that he cannot get his exceptions signed and sealed, he will be entitled to a new trial, notwithstanding the lapse of considerable time. *Alex. British Statutes*, 133; *Bennett* vs. *Penn. & O. Steamboat Co.*, 32 E. L. & Eq., 318; *Newton* vs. *Boodle*, 54 E. C. L. 795. In the last cited case seventeen months had elapsed, yet the Court thought it possible the party might be entitled to a new trial, and therefore laid a rule to show because why a new trial should not be granted. In that case the new trial was not awarded because the law was found to have been correctly laid down. In this State it is not admissible for any other judge to pass upon the correctness of his predecessor's ruling in such case. The new trial will go as a matter of course, where the exceptions were not signed and sealed, and cannot be, without any fault of the exceptant."

The grounds upon which these cases are placed are that the party having duly taken his exceptions and had the same properly noted, he cannot, without his own gross default, be deprived of his right to have his case heard, even by the death of the judge.

It seems by the rule that the trial judge in the interest of justice may exercise the broadest discre-

tion in securing to the party a right to be heard on his exceptions. It would be a reproach upon the courts if it were not so. In *U. S.* vs. *Breitling*, the bills of exceptions were signed after the term of the court had been finally adjourned, and there was neither an order of court nor a stipulation of counsel enlarging the time for the purpose; yet the bill was upheld. In *Embrey* vs. *Stanton*, which came up from this District, the verdict was rendered March 13, 1873, and the bill of exceptions was not filed and made of record, as the rules required, until Aug. 4, 1874, seventeen months after the verdict; and this practice was sustained. Several terms passed by during this interval.

In the case of *Coe* vs. *Morgan*, (13 Fed. R., 844), the court said:

> "The failure to serve the bill of exceptions in time arose wholly through inadvertence, and because of the unfamiliarity of the attorney for the plaintiff with the practice in the Federal courts. As soon as he was informed of his error he served the proposed bill. This was about *three weeks* subsequent to adjourning of the court at which the action was tried. No bad faith is alleged, and no injury to the defendant by reason of the delay is suggested. But it is contended that because the plaintiff did not procure the bill of exceptions to be served, settled and signed, or obtain an order extending time at the trial term, he is now out of court and remediless. The attorney was no doubt guilty of laches, but the punishment suggested is out of all proportion to the fault. No judgment has been entered; the proper parties are still in the circuit court. In the absence of a positive statute there can be no valid reason why the court in the exercise of a sound discretion should not relax its rules suffi-

ciently to provide for a case of such manifest hardship."

In *Greenway* vs. *Gaither*, (TANEY's Dec., 227), TANEY, *C. J.*, declared that he "should deem it his duty to seal the exceptions," although it was presented *two years* after the trial, if he had any doubt as to the correctness of his rulings upon the question of law presented. See also *Underwood* vs. *Hassock*, 40 Ill., 98; *Peck* vs. *Steamship Co.*, 3 Bosw., 622.

In *Foote* vs. *Silsby*, (1 Blach., 542,) Mr. Justice NELSON, holding a circuit court, allowed a writ of error and signed a bill of exceptions two years after the trial; and in *Marye* vs. *Strouse*, (5 Fed. R., 494), in the 9th circuit, it was held that a case may be excepted from the operation of the rule of court requiring a bill of exceptions to be drawn up within ten days after the trial when to do so will subserve the ends of justice.

The principle to be deduced from these cases is that only a substantial compliance with the rules of court is required in any case, and that when it is necessary to avoid injustice the rules themselves will be disregarded. This is to favor and not to obstruct the right to a hearing in the appellate tribunal.

II.

In this case there was a strict compliance with all the requirements of the rules of court and the statutory provisions relating to the subject.

1. Just before the time for final adjournment arrived the court entered the following order in this case, and in two other cases, to wit :

> "The court orders this term of the court extended for the settlement of bills of exceptions and case, in the three above cases."

It appears that immediately afterwards, the following general order as to all cases in which exceptions had been reserved, tried during the term was entered, to wit:

> "The court orders this term of the court extended for the settlement of bills of exceptions and case, in all cases tried this term in which exceptions have been taken and bill not settled. And thereupon the October term of this court is adjourned without day, except as above." (See motion paper, pp. 3 and 4.)

On the 8th of May, following, counsel having been unable to agree and settle the bill of exceptions, the trial justice made another order by which he limited the time to ten days for completing the bill of exceptions (R., p. 8). Within that period the bill of exceptions was signed sealed and filed and, by an order for that purpose, made part of the record. (See motion papers, p. 6.)

The rule of court relating to the time of settling bills of exceptions is as follows, to wit:

65. The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it. (See motion papers p. 11.)

These orders were made by the court for the purpose of extending the time for preparing the bill of exceptions. This was clearly intended by the court

and must have been so understood by counsel. It is now asserted that these orders were ineffectual for this purpose; and one of the reasons for the assertion, as it is understood, is that the order being indefinite as to time, was void. But the rule of court was complied with. There is nothing in the statute which limits the time within which bills of exceptions shall be signed or filed, and there seems to be no good reason why there should be. Section 803 R. S., D. C., provides that if an exception be taken during the trial, it may be entered on the minutes of the justice and afterwards settled *in such manner as may be provided by the rules of the court.* There is no other statute relating to the question with reference to the court below. The rules of court do not limit the time for settling, signing or filing bills of exceptions. That branch of the practice is confided wholly to the discretion of the trial judge, except that the rule above set out, in a *directory* way, as above shown, provides that, in cases where the bill is not signed during the term, the term "may be prolonged by adjournment in order to prepare it." But it is left to the discretion of the trial judge to determine *when* the bills shall be presented. In cases where the trial judge extends the time for settling the bill of exceptions, without limiting the period within which the bill shall be presented, it is an act in the exercise of *his discretion which an appellate court cannot review.* This court has repeatedly declared that the time within which the bill shall be presented rests in the discretion of the presiding judge, and he and he alone is to determine what is a reasonable time for such presentation. (See authorities before cited.)

As before stated, neither the rules of the court below nor the statute contain anything indicating or limiting the period within which the bills shall be settled or filed, thus pursuing the terms of the doctrine laid down and established by this court. It may well be assumed that the judge will keep such matters within his own control. If the bill is delayed too long he may readily limit the time. What is a proper time depends upon many circumstances, and these circumstances are best known to the trial judge. They can not be known to the appellate court. This court has said on this subject that "bills of exceptions can not always be formally prepared, until a considerable time after verdict and judgment. They may require, in some cases, a full statement of almost all that occurred at the trial. Papers necessary to be incorporated may be mislaid or withheld by the opposite party; the charge of the judge, to which exception has been taken, may not have been filed, or sickness may have interfered. * * * For these reasons, the universal practice is to give reasonable time to make up the bills of exceptions and obtain the signatures." (*Hunnicut* vs. *Peyton*, 102 U. S., 356.) It may be added to the above that the official engagements of the judge may require him to hold the bill for his own examination, and professional engagements of counsel, during a busy term, may render it next to impossible to prepare the bill of exceptions during the term.

In cases in the court below, when opposing counsel consider that too much delay has ensued, it is an easy matter to call upon the judge to limit the time. In this very case the judge did, by his order of May, 8, 1886 (8), so limit the time. There can be no rea-

sonable objection to such practice. No injury can possibly result to any one by it.

There has been no default or want of diligence here, such as an appellate court can consider or pass upon. Additional time to prepare the bill of exceptions was asked for and was granted by the court during the term ; when counsel had done this he had performed his whole duty. Had he neglected this, he might have been held guilty of such a "default," as is meant by the rule before stated, and negligence might possibly have been imputed. But if the court, on motion by its own order, extended the time for settling and signing this bill, that is enough. The court, in the exercise of its discretion, entered the order in its own way. It is no part of the duty of counsel to formulate orders in a court of law, and if the order in this case did not limit the time it was because the judge preferred to retain control of that matter. Such an order is sufficient. It cannot be said that the order was not in accordance with the rule of court. If the order is void the rule is void. It would be a strange species of justice to punish the plaintiff in error for the mistakes of the court below in establishing a rule of practice. Appellate courts do not search for excuses through which to deprive suitors of their right of appeal.

Chateaugay Iron Co., 128 U. S., 545.

2. One of the rules of court which, it is said, was not complied with, was the rule requiring motions for new trials to be made within four days after the verdict. (See motion paper, p. 10.) This rule has no application to motions for new trials on exceptions which are designed to secure a review of the case in

the general term. It was long ago so decided in general term by the court below. (See *Lewis* vs. *Shepherd*, 1 Mackey, 46.) That the motion filed December 29, was designed for this purpose, and that it was so understood by all parties is not susceptible of a reasonable doubt. Beyond the fact that such is the settled practice of the court below, is the further consideration that such an interpretation of the rule would deprive the defeated party of his right of going with his case to the general term where he had presented a motion for a new trial addressed to the discretion of the trial justice and made on his minutes under the provisions of section 804 (R. S., D. C.,) which the justice had declined or neglected to entertain and decide. This statute provides that—

> "The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence; but such motion shall be made at the same term at which the trial was had."

This court has given this very statute full consideration in the case of *Moore* vs. *Met. R. R. Co.* (121 U. S., 558.) It was there said :

> * * * * "If, however, the judge at special term exercises his discretion under section 804 by refusing to entertain the motion for a new trial to be made on his minutes, then the party moving for a new trial *may, under section* 806, *predicate his motion on a case or bill of exceptions*, containing, as in the former instance, all the evidence, and in that event the motion shall be heard, in the first instance at a general term."

The court further said, in the same case, on page 567:

> "The object of §§ 804 and 805 seems to be to provide for a special class of cases, in which discretion is given to the justice, at special term, to hear or *to refuse to hear* motions for a new trial, providing, in the first place, for an appeal in the usual manner, and in the latter case, *when he refuses to hear the motion, leaving it to be heard*, under § 806 on a case or bill of exceptions, in general term."

If this motion, above supposed, made on the minutes and addressed to the discretion of the justice, should be filed on the fourth day, and on the fifth the justice should refuse to entertain it, then, under the construction insisted upon, the defeated party could not "under section 806, predicate his motion on a case or bill of exceptions," as he has a right to do by the terms of the statute, because this rule would cut off his right to file such a motion at such a time.

3. It is understood that another ground relied upon in support of this motion, is that the motion for a new trial filed December 29, 1885, (R., p. 8), was a motion for a new trial on "exceptions," and not on a "bill of exceptions," and that therefore it must be held to have been *necessarily* addressed to the *discretion* of the trial justice and made upon his minutes, and that it was not based on the exceptions reserved at the trial to be afterwards drawn out in the form of a bill of exceptions; and further, that the general term could gain jurisdiction of the cause, on such a motion only by an appeal from the deci-

sion of such motion by the justice, and that inasmuch as there was no decision there could be no appeal.

A brief examination of the statutory provisions and rules of court in relation to this subject, will show that there is no foundation for such an objection. Section 804, of the statutes relating to this District, provides that the *justice* who tries the cause may, in his discretion, entertain a motion, *to be made on his minutes*, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial is had." (R. S., D. C., p. 95.) The next succeeding section (805) provides that "where such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner." Then follows the provisions of section 806, which are that every motion "for a new trial on a case of bill of exceptions * * * shall be heard in the first instance at a general term." The objection taken to the motion seems to arise out of a very close criticism upon the language found in sections 804 and 806, if not upon a misapprehension thereof. In the former, one of the motions for a new trial spoken of, is a motion "upon exceptions," and one of the motions mentioned in section 806 is a motion based on a "*bill of exceptions.*" Now, the distinction between "exceptions" and a "bill of exceptions" cannot be substantial. It is supposed that the objection, now being considered, would not have been taken if the motion, instead of employing the words "on exceptions" as it

did, had employed the other expression "bill of exceptions," or, in other words, the argument is that a motion for a new trial "on exceptions" must necessarily be a motion made upon the minutes of the justice addressed to his *discretion*, while a motion for a new trial on a "bill of exceptions" is not. But this is not the fair or reasonable interpretation of the statutes. We must look beyond these particular words for the true practice. The substantial foundation upon which the reviewing court proceeds, consists of the "exceptions" actually taken and noted on the minutes of the justice during the trial. The "bill of exceptions" is the *form* and the "exceptions" are the *substance*. The "bill of exceptions is the mere evidence of the "exceptions" themselves and a convenient manner of making the latter a part of the record of the cause, or, as it is stated in the statute of Westminster, it is "*for a testimony.*" (*Hunnicut* vs. *Peyton*, 102 U. S. 354.) But the statute does not leave the question to depend on these words. Section 804 requires that either of the motions for a new trial mentioned therein, when addressed to the *discretion* of the justice, shall "*be made on his minutes,*" and this is supplemented and enforced by the provisions of section 805, which provides that when such a motion shall have been made and heard "*upon the minutes,*" an appeal may be taken to the general term from the *decision* of the justice, provided he chooses to entertain and decide the motion; by section 804, he is allowed either to entertain, hear and decide it, or to refuse to do so. It seems, therefore, necessary before a motion can be authoritatively declared to be a motion addressed to the "justice," that there

should be something in the body of it or connected contemporaneously with it, to indicate the class of motions to which it belongs. There should be a declaration or notification to the justice in the paper itself to the effect that it is "made on his minutes," or its character should be disclosed in some other way; but it must be addressed to the *justice* who presided at the trial and not to the *court*. Such a motion is not made on the "exceptions," but on the *minutes* of the justice. It is therefore upon consideration of the language of these sections of the law alone, perfectly plain, that the motion here criticised is not addressed to the justice, but is a motion addressed to the *court* founded on a bill of exceptions to be formulated, and intended to operate as a writ of error to take the case into the general term. The language of the motion is:

> "And now comes the said defendant and moves the *court* for a new trial on exceptions." (8.)

The Plaintiff Estopped.

In addition to this the steps taken in the cases by counsel for the defendant immediately after the filing of this motion necessarily, and plainly disclosed the character of the motion, even if any ambiguity had existed. The verdict was rendered on the 18th day of December, 1885, and on the 29th of December following, this motion for a new trial on the exceptions was filed, but before it was filed the plaintiff's counsel wrote underneath the motion as follows: "Undertaking, *on the above appeal*, by way of *supersedeas* is hereby waived," which they signed; thereupon the paper was filed in court for the purpose of

taking the case into the general term for hearing on the bill of exceptions when settled. If counsel did not understand that this motion was based upon a bill of exceptions, to be subsequently formulated, upon which the cause was to be heard in the general term in the first instance, why did they give their sanction to this *supersedeas?* This motion for a new trial and the waiver of a supersedeas undertaking together, removed the cause into the general term precisely as a writ of error does in other courts, where that writ is the instrument used for removing causes to the appellate tribunal: it would be a reflection upon the intelligence of counsel to suggest that they did not perceive the necessary effect of their action. If counsel, after this action, still thought the motion was to be entertained and decided by the justice, they are estopped from saying so, after treating the defendants' motion as an appeal. In addition to this there was no suggestion by counsel for the plaintiff at the time Judge Cox signed and sealed this bill of exceptions, that he was without authority to act, or that for any reason the bill of exceptions should not be settled and signed. These objections were first made when the case was in the general term for review. This was too late. They were bound to make their objections when the acts complained of were done. They had full knowledge of all the proceedings.

The general term took no notice of these objections but heard the case on the merits. (5 Mackey, 144). The trial justice did not regard the motion as still before him; otherwise he would not have made the order of January 23, 1886, (see motion paper, p. 3–4), further extending the term for the purpose of set-

tling thebill of exceptions in this case, nor would he have signed and sealed the bill of exceptions afterwards as he did, in fulfillment of the previous orders. And if he had regarded the motion as still addressed to his discretion he would have made some order in the case as is required by rule 63. This rule requires that "all motions for new trials not heard and decided at the term at which the same shall have been made, shall be deemed to have been overruled, *and shall be so entered on the proceedings of the last day of the term*, unless the motion has been continued by special order of the court." No such order as this was made by the court or justice; the justice must have thought, with the counsel for the defendant, that the cause had been effectually removed to the general term.

The act of removing such causes as we have here from the special to the general term, is not called an "appeal" as in equity, and in the other proceedings which we have been discussing above; but the motion for a new trial on a case or bill of exceptions is the same thing, and it is so regarded by the statutes and by the rules of court.

Is it necessary to file any written motion?

4. When we keep in mind the fact that the various branches or terms of the court below constitute but one court, (Sec. 753, R. S., D. C.; *Moore* vs. *R. R.*, 121 U. S., 572), and the further fact that the foundation for the review of a cause tried at *nisi prius* before a jury in the special term of that court, is a bill of exception, we may well doubt whether the filing of any formal motion in writing, for a new trial, is necessary. Such a formal motion is the

merest form. The reservation of exceptions at the trial, the tendering, signing and filing a bill of exceptions, it should seem, are sufficient to authorize a review by the general term of the proceedings and judgment of the special term without more. The statute neither says nor contains any intimation that a motion for a new trial shall be made in writing by the party. Why is it not sufficient to make it in open court after the bill of exceptions shall have been formulated? This seems to have been the course pursued in the case of Chateaugay Ins. Co., 128 U. S., 544. It seems to me to be the better course, to look only to the bill of exceptions, and this course seems to be more in consonance with the system of practice established by the statute law.

The motion of Dec. 29, taken in connection with the waiver of an undertaking by way of a supersedeas, amounts to an appeal, and the approval on the paper by plaintiff's counsel, amounts to notice and consent by the plaintiff. (See *Marye* vs. *Strouse*, 5 Fed. R.; *U. S.* vs. *Breitling*, 20 How.; *Muller* vs. *Ehlers*, 91 U. S., cited above.) The steps taken in this case constitutes an "appeal." Section 772 enacts that—

> "Any party aggrieved by any order, judgment or decree, made or pronounced at any special term, may, if the same involved the merits of the action or proceeding, *appeal therefrom to the general term.*"

This court has decided that when the party intending to appeal, signifies his intention of so doing, that fact is sufficient, however informal the paper may be (*U. S.* vs. *Adams*, 6 Wall., 101). In the case cited the paper filed (in the court of claims) for the pur-

pose of taking an appeal, contained the title of the cause, was signed by counsel and merely stated that the United States made "application" to that court "for an appeal of the case" * * "to the supreme court of the United States." This was held to be sufficient.

5. *Assuming the motion for a new trial to have been addressed to the discretion of the trial justice under section* 804, *R. S., D. C., the practice was unobjectionable and effectually removed the cause to the general term.*

As before shown, the trial justice may in his discretion refuse to entertain a motion made on his minutes to set aside a verdict and grant a new trial upon exceptions under section 804; if this course is adopted by the justice then a bill of exceptions may be demanded by the suitor or, as this court declared "when he refuses to hear the motion, leaving it to be heard under section 806, on a case or bill of exceptions in general term." (*Moore* vs. *R. R.*.)

If the motion really was such as counsel for the plaintiff contend then it was simply not entertained, and therefore it devolved upon the defendant the necessity of having the exceptions already taken and reserved, settled or formulated in a bill of exceptions. In this view of the case it is immaterial whether the motion was made within four days or eleven days; it is beyond the power of the court below to limit the time for making such motion, because the statute (Sec. 804), gives the whole term for that purpose. The statute says, "but such motion shall be made at the same term at which the trial was had."

This court has declared that the power to make rules given by the statute is subject to the statutory provisions. (*Moore* vs. *R. R.*, 121 U. S., 565.)

If the motion had been entertained and decided adversely to the defendants, assuming as before that it was made on the minutes of the justice, the defendant, could then have appealed from that judgment, for the error complained of would then have been spread out on the record, but not having been entertained it was necessary that the bill of exceptions should be settled, as a certification or "testimony" as to what the court decided and to which the defendants noted their exceptions.

The motion should be denied.

ENOCH TOTTEN,
For Plaintiff in Error.

Office Supreme Court U. S.
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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

WASHINGTON AND GEORGETOWN RAILROAD CO.,
Plaintiff in Error,
vs.
LEWIS H. McDADE.

No. 137.

Additional Brief for Plaintiff in Error on Motions to Strike out Bill of Exceptions and to Dismiss Writ of Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

WASHINGTON AND GEORGETOWN RAILROAD CO., *Plaintiff in Error,* *vs.* LEWIS H. McDADE.	No. 137.

Additional Brief for Plaintiff in Error on Motions to Strike out Bill of Exceptions and to Dismiss Writ of Error.

Since the briefs on the motions in this cause were filed the Supreme Court of the District of Columbia, in General Term, after elaborate argument, has overruled a motion undistinguishable from those made in behalf of the defendant in error in this case. The motion in those cases, and the opinion of the court are here presented.

That motion was as follows:

"IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

IN GENERAL TERM.

THOMAS W. JONES *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *et al.*	At Law. No. 26,298.
and	
CHARLES T. STEWART *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *et al.*	At Law. No. 26,303.

Plaintiffs' Motions to Strike out Bills of Exceptions, and Dismiss.

And now come the said plaintiffs by their attorneys, and appearing in the General Term specially for the purpose of objecting to the jurisdiction of the said General Term in each of said causes, and for no other purpose whatever, move the Court as follows, to wit:

First. To declare that the bills of exceptions filed in the clerk's office in each of said causes on the 15th day of July, 1889, form no part of the record thereof, and to expunge and strike them from the files of the Court.

Second. To dismiss the motion for a new trial upon bills of exceptions, filed in each of said causes in the clerk's office on the 15th day of July, 1889, and

Third. To strike said causes from the calendar of the General Term.

Said motions are based upon the following grounds, amongst others, to wit:

First. Said causes were tried at the January term, 1889, of the circuit court, which expired by limita-

tion, and was adjourned without day on the 11th day of May, 1889, and said term was not prolonged by adjournment for the purpose of preparing bills of exceptions in said causes, nor did the counsel for defendants during said term prepare bills of exceptions and submit the same to counsel for plaintiffs, or notify them of any time at which it was proposed that the same should be settled, or that application would be made to the court to settle bills of exceptions at all, or to extend the term for that purpose. But said bills of exceptions were prepared, after the final adjournment of said term, and settled and signed on the 15th day of July, 1889, without the consent of the attorneys for the plaintiffs, and against their objections and protests.

Second. The Chief Justice, who presided at the trial of said causes, had no authority or jurisdiction to settle and sign said bills of exceptions on the 15th day of July, 1889, when the same was done.

Third. At the time said bills of exceptions were settled and signed, no motion for a new trial, or appeal, was pending, and the time had then expired within which the defendants could legally make such motion, or take such appeal.

Fourth. The only motion for a new trial filed in said causes within four days after verdict, was a motion "on exceptions," addressed to the justice who presided at the trial, of which the general term could obtain jurisdiction only by appeal from the judgment of said justice overruling said motion, and no such judgment was made, and consequently no appeal was or could have been taken.

Fifth. Said motion for a new trial "on exceptions" was defective in failing to state the specific grounds upon which it was based, and no notice was given to the attorneys for the plaintiffs of the filing of said motion, or of the intention of defendants' attorneys to move the court to act thereon, and said justice could not properly, and did not take jurisdiction thereof, or act thereon, and the defendants' attorneys abandoned the same.

Sixth. No appeal has been taken by the defendants from any judgment of the circuit court in said causes, or from any judgment or ruling of the justice who presided at the trial.

Seventh. No motion for a new trial upon bills of exceptions was made in either of said causes within four days after verdict, or at the term at which said causes were tried.

Eighth. The motion for a new trial upon bills of exceptions, filed in said causes on the 15th day of July, 1889, was filed more than four days after verdict, and after the term at which said causes were tried, and was not filed in the circuit court.

Ninth. Because said bills of exceptions were settled and signed, and said motions for a new trial were made, in violation of the law and the rules of said court in relation thereto, as set forth in sections of the Revised Statutes of the United States relating to the District of Columbia, numbered from 803 to 806, both inclusive, and the general rules of said court, numbered 2, and from 54 to 65, both inclusive, and 89, which are hereby referred to and made a part of this motion.

W. A. Cook,
Cole & Cole,
Attorneys for Plaintiffs.

Opinion of the Court.

Notices to dismiss the appeals, are made in these cases. The facts, in brief, are as follows: On the 1st of May, 1889, the jury rendered a large verdict in each case for the plaintiff. On the 3rd of May (within the four days limited by the rule) the defendant's counsel made the motion for a new trial, which is the subject of the present controversy. On the 8th of the month supersedeas bonds were filed, which were endorsed as satisfactory by the plaintiffs' counsel and affirmed by the court. On the 11th the court passed the order extending and prolong-

ing the term for the purpose of settling exceptions in cases tried at the term, where the bills had not been settled. On the 20th of July, the defendant's counsel gave notice to the counsel of the plaintiff, that the bills of exceptions would be presented to the presiding justice on the 25th of that month. On that day the plaintiff's counsel appeared and interposed objections in writing, on various grounds, to the settling of the exceptions. After argument these objections were overruled, and the bills were finally settled and signed on the 15th of July.

The reasons assigned, and earnestly pressed in support of the motion to dimiss the appeal, attack the regularity and efficacy of every step we have alluded to, from the first notice of the motion for a new trial.

1. This motion of the defendant's counsel, made in open court on the second day after the verdict, is in these words: "Now come the defendants and move the court to set aside the verdict and grant a new trial *on exceptions*."

It is insisted by the plaintiffs, that this must have been designed at the time and can only be understood as a motion under Sec. 804 of our Revised Statutes; and hence it cannot now be regarded as an appeal to the General Term, which will authorize us to examine the rulings below, as presented by the Bill of Exceptions contained in the record.

That section provides:

"If upon the trial of a cause an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the question to be raised, but such case or bill of exceptions need not be sealed or signed."

SEC. 804, is as follows: "The justice who tries the cause may, in his discretion, entertain a motion, to

be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be heard at the same term at which the trial was had."

SEC. 805, is as follows: "When such motion is made and heard upon the minutes, an appeal to the Heneral Term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner."

SEC. 876, is in the following words, to wit: "A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the Court, shall be heard in the first instance at a General Term."

The defendant's counsel declare that their motion was intended to be made under Sec. 806, and not under 804. They admit that the language of the order is imperfect and incorrect, because of the omission of the words "bill of;" but they insist that this was a mere clerical error which should not affect the efficacy of this notice.

The motion cannot be considered as strictly following the method indicated by either of the sections referred to.

If the defendant had intended to present a motion literally complying with the requirements of Sec. 804, and Rule 54, applicable thereto, he would have explicitly asked the Justice who tried the cause to entertain a motion *made on his minutes* to set aside the verdict and grant a new trial "*upon* exceptions," &c. The actual motion seems to differ more in language from that thus indicated, than it does from the literal requirements of Sec. 806.

We must look to the surrounding circumstances of the transaction for guidance as to the purpose of the motion.

If the defendant had been proceeding under Sec. 804, and the Justice had decided to "entertain the

motion," it would have been the duty of counsel on both sides to submit or argue it before the Justice; and if it had been overruled the defendant could then appeal *from that decision* to the General Term.

But no such steps were taken here as are required under Sec. 804 and 805; and the omission to pursue those methods of obtaining the benefits of these sections tend to show that they were not in the contemplation of the defendant.

On the other hand, if the purpose was to proceed under Sec. 806, all was done by the defendants, after the imperfect motion was made in open court, that was required to obtain the benefit of that section.

On the 8th of May supersedeas bonds were filed by the counsel for the defendants, and after being submitted to the counsel for the plaintiffs, who pronounced the sureties satisfactory, they were approved by the justice. Now, if they had been proceeding under section 804, no supersedeas bond would have been presented at that stage. No such bond is necessary while the trial justice is hearing a motion for a new trial on exceptions noted on his minutes; since no execution could issue while the motion was pending. But the counsel for the defendants took the trouble, before this supersedeas bond was submitted to the court, to secure from the counsel for the plaintiffs his approval of the sureties. It may be said that the plaintiffs' counsel was not obliged to say anything to set his opponent right, if he then thought he was doing a futile thing in giving a bond where none was needed. Doubtless he was not obliged to do that. But still his conduct in certifying to the sufficiency of the bond looked as if he was acting at that time in accordance with what the defendants now insist was their object in filing the motion; we do not say it is conclusive of the question, but we think it is persuasive to us of the understanding of those interested in the matter at that time, and especially of the understanding of the justice when he approved the bond.

Although it would evidently be advisable to limit the time within which the bills of exceptions should be presented, we do not consider the omission to do so in this instance as having the effect insisted on. The final closing of the term was a matter wholly within the power of the court at any time, when the justice should be of the opinion that a sufficient indulgence had been extended for the purpose of presenting the bills of exceptions. Such orders have been on other occasions recorded in this form by the clerk.

Second. It is said to be unauthorized, because it does not specify the cases which were designed to be included in the order.

We do not think this objection can be sustained. The order was broad enough to include the present cases, and that others could have been embraced within its general language could not deprive these parties of their rights. We make the same remark, that it would be decidedly preferable that there should be an enunciation of the cases left open, and entitled to claim the benefit of the order.

5. Then it is next said the justice had no right to pass the order without notice to the plaintiff. But they had the notice that was given to the whole world when this entry was made on the minutes of the court. That was all the notice required.

6. Then, had the justice the right to sign the exceptions when they were presented to him? No complaint can be made on the ground of lack of notice, as the defendants gave notice; and the plaintiffs were present according to the notice, and contested the right of the court to settle the bill of exceptions. We think the justice had a perfect right to do as he did, and the exceptions are properly before us; and we think the case is here properly on appeal, and ought to be entertained.

All Appellate Courts are painfully aware that appeals are increasing in undue proportion to the

general increase of legal business. This undue increase is a grievance, and a reproach to the judicial system. The facility of presenting appeals, encourages their prosecution where delay may be the main purpose to the serious injury of deserving suitors. The Appellate Courts should do nothing to encourage this, because they are powerless to prevent it, and it is their duty to refuse to entertain appeals where they present themselves in contravention to law or explicit rules.

But when we can see that a suitor has made an honest effort to exercise his legal right of appeal, and has contravened no absolute rule, but has erred only in not complying with some technical form, we think it is our duty to overlook such a defect and entertain the appeal.

The motions are overruled."

The motions now presented here in the present case were made and argued in the General Term of the court below, but, as before stated, no notice whatsover was taken of them.

It is submitted that the motions made in behalf of the defendant in error should be overruled.

ENOCH TOTTEN,
For Pl'f in Error.

Office Supreme Court U. S.
FILED.
NOV 14 1889
JAMES. H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Plaintiff in Error.*
vs.
LEWIS H. McDADE, *Defendant in Error.*
No. 137.

MOTIONS OF DEFENDANT IN ERROR TO DISMISS, AND TO STRIKE OUT BILLS OF EXCEPTIONS.

W. A. COOK,
COLE & COLE,
Attorneys for Defendant in Error.

LAW REPORTER PRINT, 503 E ST.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Plaintiff in Error*,
vs.
LEWIS H. MCDADE, *Defendant in Error*. } No. 137.

MOTION OF DEFENDANT TO DISMISS THE WRIT OF ERROR.

And now comes the defendant in error, by his attorneys, and moves the Court to dismiss the writ of error, on the ground that the General Term of the court below never acquired jurisdiction of the case, because—

First. No motion for a new trial was made within four days after verdict, as required by the rules of the court below.

Second. No motion for a new trial was made upon bills of exceptions, or addressed to the General Term.

Third. The motions for a new trial were addressed to the trial court, and the General Term could obtain jurisdiction thereof only by act of the justice who presided at the trial certifying the motions to be heard in the General Term in the first instance, or by appeal to General Term from the judgment of said justice overruling said motions, or one of them, neither of which was done.

Fourth. No appeal was taken from the judgment of the trial court.

Motion to Strike Out Bills of Exceptions.

And now comes the defendant in error, by his attorneys, and moves the Court to strike out the papers found in the printed record from page 9 to page 49, both inclusive, called "exceptions," for the following, amongst other reasons, to wit:

First. Said "exceptions" are no part of the record of said cause.

Second. The same were not settled and signed by the judge who presided at the trial, and made a part of the record in said cause, during the term of the Court below at which said cause was tried, nor within any time afterwards, fixed by order of Court made during said term, but were signed after the end thereof, and without the consent of attorneys for defendant in error, and not within a reasonable time after the trial of said cause.

W. A. Cook,
Cole & Cole,
Attorneys for Defendant in Error.

Copies of Orders and Rules in Support of the Foregoing Motion.

Consent of Counsel.

In the Supreme Court of the United States.

October Term, 1889.

Upon a writ of error to the Supreme Court, D. C.

The Washington and Georgetown Railroad Company, *Plaintiff in Error.*
vs.
Lewis H. McDade, *Defendant in Error.*
} No. 137.

It is agreed between the counsel for the respective parties in this case that the following orders entitled in this case,

and the motion filed therein and notice thereto attached as certified by the Clerk of the Supreme Court of the District of Columbia constitute a part of the proceedings and record in said cause in the said Court, and that the other orders certified by said Clerk and hereto attached are a part of the records of said Court, and that the following rules of practice certified by said clerk are some of the rules of practice of said Court in force during the time covered by the said certificate of said clerk; and that said copies of orders, motion and notice and rules, and certificate, may be filed in this cause in the clerk's office of this Court, and may be considered as a part of the record at the hearing of said cause with the same force and effect as if the same had been sent up by said clerk as a part of his return to said writ of error.

November 11, 1889.

ENOCH TOTTEN,
For Plaintiff in Error.
C. C. COLE,
For Defendant in Error.

The Orders and Motion referred to in the Foregoing Stipulation.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Copies from the Minutes of the Circuit Court at the October Term, 1885.

SATURDAY, *January 23d, A. D. 1886.*

Session resumed pursuant to adjournment, COX, Justice, presiding.

* * * * * * *

SAMUEL C. MILLS AND MAURICE F. TALTY, *Plaintiffs,*
vs.
THE DISTRICT OF COLUMBIA, *Defendant,*
and
} At Law. No. 24,844.

HENRY E. WOODBURY, *Plaintiff*,
vs.
THE DISTRICT OF COLUMBIA, *Defendant*,
} At Law. No. 23,172.

and

LEWIS H. MCDADE, *Plaintiff*,
vs.
WASHINGTON & GEORGETOWN R. R. CO., *Defendant*.
} At Law. No. 25,023.

The Court orders this term of the Court extended for the settlement of bills of exceptions and case, in the three above cases.

* * * * * * *

The Court orders this term of the Court extended for the settlement of bills of exceptions and case, in all cases tried this term in which exceptions have been taken and bill not settled.

And thereupon the October term of this Court is adjourned without day, except as above.

Copy of Motion Filed.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

In General Term, the 24th day of April, 1886, in the Case of—

LEWIS H. MCDADE
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY.
} At Law. No. 25,023.

And now comes the plaintiff, by his attorney, and moves the Court to dismiss the appeal taken by defendant in this cause from the judgment rendered by the Circuit Court, upon the following grounds, to wit:

First. Because no bill of exceptions has been signed in the case.

Second. Because no bill of exceptions has been prepared or tendered by the counsel for the defendants to the coun-

sel for the plaintiff, and no notice given to settle such bill of exceptions, as required by rule of the Court.

Third. Because an unreasonable time has elapsed since the rendition of the verdict and judgment in said cause without any steps having been taken on the part of the defendant's counsel to have a bill of exceptions settled and signed.

Fourth. Because the term of Court at which the verdict and judgment were rendered has expired, and no bill of exceptions can now legally be signed.

Fifth. Because the justice holding the Circuit Court cannot prolong the term for the purpose of signing bills of exceptions for an indefinite and unreasonable length of time.

Sixth. Because the justice holding the Circuit Court cannot prolong the term for the purpose of settling and signing bills of exceptions into a succeeding term of the said Court, and because no such order appeared on the minutes of the Court until the expiration of the term.

Signed

W. A. Cook,
C. C. Cole,
Attorneys for Plaintiff.

Notice.

To Messrs. W. D. Davidge, and Enoch Totten,
Attorneys for the Defendant:

Take notice that the foregoing motion has been filed and will be called up for the action of the Court in General Term, on Monday, the 26th day of April, 1886, at the meeting of the Court, or as soon thereafter as counsel can be heard.

W. A. Cook,
C. C. Cole,
Attorneys for Plaintiff.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Extract from Docket Entries of the Circuit Court.

LEWIS H. McDADE, *Plaintiff.*	
vs.	At Law.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY, *Defendant.*	No. 25,023.

Filed May 18, 1886, Cox, Justice.

Now again comes here the defendant by its said attorney and tenders to the Court here its bill of exceptions to the rulings of the Court on the trial of this case, and prays that they may be duly signed, sealed and made a part of the record now, for then, which is done accordingly.

The October Term of this Court is adjourned without day.

Orders and Rules of the Supreme Court of the District of Columbia.

Proceedings before the Supreme Court of the District of Columbia, in General Term, commencing the third Monday, 15th day of October, in the year of our Lord, one thousand eight hundred and sixty-six.

SATURDAY, *January* 12, 1867.

The Court resumes its session according to adjournment, present, Chief Justice Cartter and Justices Olin, Fisher and Wylie.

Ordered that, hereafter, in each year, on or before the first Monday of February, the Chief Justice of this Court shall make an assignment of each of the justices of this Court to hold the various courts for the then coming year.

And no justice of this Court shall transact, or interfere with the business of either of such Courts, to which he is not assigned, except on a written request of the justice assigned to hold such court.

And such assignment, when made, shall be entered upon the minutes of the Court.

WEDNESDAY, *January* 6, 1886.

ASSIGNMENT OF JUSTICES FOR 1886.

In the General Term: Chief Justice CARTTER,
Justice COX,
Justice MERRICK.

In the Circuit Court: Justice Hagner.
In the Equity Court: Justice JAMES.
In the Criminal Court: Justice MAC ARTHUR.
In the Orphans Court: Justice JAMES.
In the District Court: Chief Justice CARTTER.

Proceedings before the Supreme Court of the District of Columbia, holding a special term at law and Circuit Court, commencing the Fourth Monday, it being the 25th day of January, 1886.

* * * * * * *

MONDAY, *January* 25, A. D. 1886.

By order of Alexander B. Hagner, one of the Justices of said Court presiding, the Court is opened by proclamation of the Marshal, pursuant to rule of Court.

* * * * * * *

SATURDAY, *May* 8, 1886.

Session resumed pursuant to adjournment, Hagner, Justice presiding.

And thereupon the January Term is adjourned without day, except for settling and signing bills of exceptions and case for which purpose the term is prolonged by adjournment for thirty days from this day.

A. B. HAGNER.

Proceedings before the Supreme Court of the District of

Columbia, holding special term at law and Circuit Court, in and for said District, commencing the Second Monday, it being the tenth day of May, A. D. 1886.

MONDAY, *May* 10, A. D. 1886.

By order of Hon. Alexander B. Hagner, one of the Justices of said Supreme Court presiding, the Court is opened by proclamation of the Marshal, pursuant to rule of Court.

* * * * * * *

TUESDAY, *May* 18, 1886.

Session resumed pursuant to adjournment, Hagner, Justice, presiding.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Proceedings before the Supreme Court of the District of Columbia in General Term, commencing on the third Monday, 19th day of April, 1875.

* * * * * * *

MONDAY, *June 22, 1875.*

Session resumed, pursuant to adjournment; present, Justices Olin, Wylie and MacArthur.

Rules of Practice—Revision.

The Court adopts the rules of practice submitted on the 30th of January, by Mr. Merrick, President of the Bar Association of this District, except that the former rule for admission to the bar shall be continued in force instead of the rule upon that subject proposed by the Bar Association, and also that the May term of the Circuit Court shall terminate on the third Saturday in July, and not on the first day of July as proposed by the Bar Association.

And it is ordered that the clerk shall make a requisition upon the Congressional Printer for printing and binding five hundred copies of said Revised Rules, together with the Equity and Admiralty Rules as they now exist.

[The rules of Court referred to in the above order numbered 2, 60, 61, 63, 64, 65, 66, 67 and 68 are as follows:]

Terms of the Court.

2. The GENERAL TERM—
4th MONDAY OF JANUARY.
4th MONDAY OF APRIL.
1st MONDAY OF OCTOBER.

The CIRCUIT COURT—Special Term at Law.
4th MONDAY OF JANUARY.
2d MONDAY OF MAY—Which term shall not continue beyond the 3d Saturday in July, except to finish a pending trial.
3d MONDAY OF OCTOBER.

The DISTRICT COURT—
1st MONDAY OF JUNE.
1st MONDAY OF DECEMBER.

The CRIMINAL COURT—
1st MONDAY OF MARCH.
3d MONDAY OF JUNE.
1st MONDAY OF DECEMBER.

The SPECIAL TERM—1st TUESDAY of every month save AUGUST, in which month there is no court.

Motions for a new trial.

60. Motions for a new trial, which are designed to set aside a verdict and procure a new trial of a case, are of two kinds, to wit:

1. Those which are grounded upon alleged error of law by the justice presiding, in his rulings during the trial, in admitting or excluding evidence, or in his instructions to the jury; these motions must be made upon a bill of exceptions, and are to be heard in the general term in the first instance. But the justice who tried the cause may, in his discretion, entertain a motion on exceptions taken at the trial to set aside the verdict for error in law.

2. Those which are grounded upon the following and similar allegations:

(1.) That the party moving for the new trial had no notice and did not appear at the trial;

(2.) Misbehavior of the successful party;

(3.) Misbehavior of the jury;

(4.) That the verdict is contrary to the evidence;

(5.) That the verdict is unreasonable or uncertain;

(6.) That the verdict was obtained by surprise;

(7.) That a new and material fact, unknown at the time of the trial, and not ascertainable by reasonable diligence by the party moving, has come to light since trial, and the the like.

These motions are addressed to the discretion of the justice presiding at the trial, and are not appealable.

61. Every motion for a new trial shall be in writing, and shall state in separate paragraphs, successively numbered, the grounds upon which it is based; and it shall be entered on the minutes of the court on the day it is presented to the court.

All motions for new trial must be made within four days after verdict.

[Rule 62 provides for giving bond to suspend execution during pendency of motion for new trial.]

63. Upon the overruling of this motion judgment shall be entered up against the moving party and his surety, and execution shall issue thereon.

All motions for new trials, not heard and decided at the term at which the same shall have been made, shall be deemed to have been overruled, and shall be so entered on the proceedings of the last day of the term, unless the motion has been continued by special order of court.

Exceptions.

64. If a party proposes to have errors of law in the rul-

ings or instructions of the justice presiding reviewed, either in the general term or in the Supreme Court of the United States, he must, at the trial and before verdict, except to such rulings or instructions; and he may, at the time of taking exception, reduce the same to writing in a formal bill of exceptions, or the justice may enter the exception upon his minutes, and proceed with the trial, and afterwards settle the bill of exceptions; but, on the demand of the attorney of either party, the bill of exceptions shall be settled and signed before the jury retire.

Time of settling exceptions.

65. The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it.

How settled if counsel disagree.

66. Every bill of exceptions shall be drawn up by the counsel of the party tendering it, and submitted to the counsel on the other side; and where the bill of exceptions is not settled before the jury retires, the counsel tendering the bill of exceptions shall give notice in writing to the counsel on the other side of the time at which it is proposed that the bill of exceptions shall be settled, and shall also, at lease three days, Sundays exclusive, before the time designated on such notice, submit to the counsel on the other side the bill of exceptions so proposed to be settled; and if they cannot agree, it shall be settled by the justice who presided at the trial; and in that case, the justice shall be attended by the counsel on both sides, as he may direct.

If not settled, new trial to be granted.

67. In case the judge is unable to settle the bill of exceptions, and counsel cannot settle it by agreement, a new trial shall be granted.

To be made part of record.

68. In every case the fact of the settling and filing of the bill of exceptions, and that it is made part of the record, shall be noted on the minutes of the Court.

Proceedings before the Supreme Court of the District of Columbia, in General Term, commencing on the Fourth Monday, it being the 25th day of January, 1886.

* * * * * * *

THURSDAY, *March* 11, 1886.

Session resumed pursuant to adjournment: present Chief Justice Cartter and Justices Cox and Merrick.

A new edition of the rules of this Court having, by its authority, been prepared and printed, entitled as follows: "Rules of the Supreme Court of the District of Columbia, adopted at the January Term, 1886. Washington, Judd & Detweiler, Printers and Publishers, 1886." It is thereupon, this 11th day of March, eighteen hundred and eighty-six. Ordered, by the Supreme Court, in General Term, that the rules in said edition contained, be, and the same are hereby adopted, in lieu of the rules heretofore in force, as the rules of the Supreme Court of the District of Columbia, to take effect on the first Monday of April, eighteen hundred and eighty-six: and that a copy of the same, authenticated by the seal of the Court, be filed and kept in the Clerk's office.

Certificate of the Clerk.

I, R. J. Meigs, Clerk of the Supreme Court of the District of Columbia, do hereby certify that the foregoing writings are true copies of original orders, and rules on file and of record in said office made and adopted by the Supreme Court of the District of Columbia, and now remaining of record therein; that neither of said orders appear to have been revoked or modified, except as appears in the copies

aforesaid, and that the said rules as hereinbefore set forth were in force on the 19th day of October, 1885, and until the 5th day of April, 1886, and that by the revision of rules which went into force on the last mentioned day, there was no change in the language of rules numbered two, sixty-five (65) sixty-six (66) and sixty-eight (68), but a change was made in the numbers thereof, the one numbered sixty-five being changed to sixty-two, the one numbered sixty-six being changed to sixty-three, and the one numbered sixty-eight being changed to sixty-five.

Given under my hand and the seal of the said Court this 8th day of November, 1889.

R. J. MEIGS,
Clerk.
By R. J. MEIGS, JR.,
Assistant Clerk.

{Seal of the Supreme Court of the District of Columbia.}

I, Edward F. Bingham, Chief Justice of said Court, do certify the foregoing attestation by R. J. Meigs, clerk of said Court to be in due form.

Witness my hand and seal this 12th day of November, 1889.

EDWARD F. BINGHAM.
[SEAL.]

I, R. J. Meigs, clerk of said Court, hereby certify that Edward F. Bingham, whose genuine signature is subscribed to the forogoing certificate, was at the time of signing and attesting the same, Chief Justice of said Court, duly commissioned and qualified.

Witness my hand and the seal of said Court this 12th day of November, 1889.

R. J. MEIGS,
Clerk.
By R. J. MEIGS, JR.,
Assistant Clerk.

[SEAL SUP. COURT D. C.]

ENOCH TOTTEN AND W. D. DAVIDGE.
Attorneys for Plaintiff in Error.

Take notice that the foregoing motion and papers in support thereof have been filed in the clerk's office of the Supreme Court of the United States, in the case first hereinbefore entitled, and that the same will be relied upon at the hearing of said cause.

W. A. COOK,
COLE & COLE,
Attorneys for Defendant in Error.

November 12, 1889.

Office Supreme Court U. S.
FILED
NOV 20 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Plaintiff in Error.*
vs.
LEWIS H. McDADE, *Defendant in Error.*
} No. 137.

BRIEF FOR DEFENDANT IN ERROR.

W. A. COOK,
COLE & COLE,
Attorneys for Defendant in Error.

LAW REPORTER PRINT, 503 E ST.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1889.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Plaintiff in Error,*
vs.
LEWIS H. MCDADE, *Defendant in Error.*
No. 137.

BRIEF IN BEHALF OF THE DEFENDANT IN ERROR UPON THE MOTIONS TO DISMISS, AND TO STRIKE OUT THE BILLS OF EXCEPTIONS.

FIRST.

The Motion to Dismiss.

The ground of this motion is that the general term of the court below never acquired jurisdiction of this cause, and that therefore this court has none.

The state of the record upon which this motion is based is as follows, to wit: The judgment of the circuit court, (or special term), was in favor of the defendant in error, (record, pp. 7 and 8), which was affirmed by the general term, (record, p. 50), and the writ of error is to the last-mentioned judgment.

The verdict and judgment were rendered in the circuit court on the 18th day of December, 1885. There were two

motions filed for a new trial, one on the 29th day of December, 1885, "*on exceptions*," and the other on the 22d day of January, 1886, for the alleged insufficiency of the evidence and excessive damages (Record p. 8). The circuit court did not take jurisdiction of nor act upon either of these motions. No appeal was taken by the plaintiff in error from the judgment of the circuit court upon the verdict, or from any ruling made by it at the trial.

The sections of the Revised Statutes of the United States relating to the District of Columbia, regulating the manner of obtaining a review by the general term, of the rulings at the special terms of the supreme court of the District of Columbia, are as follows, to wit:

SEC. 772. Any party aggrieved by any order, judgment, or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the supreme court, and upon such appeal the general term shall review such order, judgment, or decree, and affirm, reverse, or modify the same, as shall be just.

SEC. 806. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the Court, shall be heard in the first instance at a general term.

SEC. 803. If upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterward settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the question to be raised, but such case or bill of exceptions need not be sealed or signed.

SEC. 804. The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be heard at the same term at which the trial was had.

SEC. 805. When such motion is made and heard upon the

minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

Section 770 of said Revised Statutes authorizes the court to make rules of practice, in the following language, to wit:

SEC. 770. The supreme court, in general term, shall adopt such rules as it may think proper to regulate the time and manner of making appeals from the special term to the general term, and may prescribe the terms and conditions upon which such appeals may be made, and may also establish such other rules as it may deem necessary for regulating the practice of the court, and from time to time revise and alter such rules. It may also determine by rule what motions shall be made at a special term, as non-enumerated motions, and what motions shall be heard at a general term in the first instance.

In pursuance of this authority that court, at an early day after its organization, adopted rules of practice, which have from time to time been revised. Those in force at the time of the proceedings in this case in the court below, bearing upon the questions involved in these motions, are in the record, properly certified (*M. R. pp. 9 to 12 inclusive).

Examining the proceedings below in the light of said rules and statutes, counsel for defendant in error contend that the general term acquired no jurisdiction of this case because—

(*a*) *The motions for a new trial were not filed within four days after verdict, as required by the 61st rule.*

(*b*) *The said motions were addressed to the circuit court, which did not take jurisdiction thereof, nor act thereon, and could not lawfully have done so, and they lapsed on the last day of the term at which they were made.*

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*Motion Record.

(c) *No appeal was taken by plaintiff in error to the general term from any judgment of the circuit court in said cause.*

A.

The motions for a new trial were not filed in time.

The earlier motion was not made until *11 days* after, and the latter one *35 days* after verdict. The rule says that "*All motions for a new trial must be made within four days after verdict.*" The statute authorized the court to make this rule. It is as binding as if it were a part of the statute itself. The Court which made it may rescind it, but while it remains unrevoked, that court cannot except any case from its operation, but it is binding alike upon all litigants.

Mills *vs.* Bank U. S., 11 Wheat., 439.
Hiriart *vs.* Ballon, 9 Peters, 156.
Kitchen *vs.* Randolph, 93 U. S., 92.
Sage *vs.* R. R. Co., Id., 417.
Coughlin *vs.* Dist. Col., 106 U. S., 7.
Hovey *vs.* McDonald, 109 U. S., 150.
U. S. *vs.* Mundell, 1 Hughes C. C. R., 415.
Seymour *vs.* Phillips, 7 Biss., 460.
Thompson *vs.* Hatch, 3 Pick., 312.
Wall *vs.* Wall, 2 Har. and Gill., 79.
Ogden *vs.* Robertson. 3 Green, 124.
Walker *vs.* Duckross, 18 La. An., 703.
Houston *vs.* Kidwell, 83 Ky., 301.
Ins. Co. *vs.* Kiernan, Id., 468.
Harvey *vs.* Fink, 111 Ind., 249.
Conley *vs.* Silverthrone, 9 Cal., 67.
Calderwood *vs.* Brooks, 28 Cal., 154.
Campbell *vs.* Jones, 41 Cal., 515.
Wills *vs.* Rhen Kong, 70 Cal., 548.

In *Sage* vs. *The Railroad, supra,* this Court, speaking of the necessity of the party taking his appeal to this Court

within the time limited by statute, if he desires it to operate as a *supersedeas*, says:

"Time is an essential element in the proceeding, and one which neither the Court nor the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he can not be deprived without due process of law. The court can no more give effect to a *supersedeas* by ordering that the appeal shall relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years, by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purpose, it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done."

No reason is perceived why this rule does not apply with equal force to the limit within which a motion for a new trial is required to be filed.

In *Coughlin against the District of Columbia, 106 U. S.*, it is strongly intimated by this Court, though not expressly decided, that the court below could not take jurisdiction of a motion for a new trial not filed within the time prescribed by the rule.

The code of practice of Kentucky requires a motion for a new trial to be filed within three days after the verdict or decision is rendered. In the case of *Houston vs. Kidwell*, in the Court of Appeals of that State above cited, the court says:

"This rule of practice is imperative, and cannot be dispensed with unless circumstances over which the party or his attorney had no control prevented it."

In Insurance Co. *vs.* Kiernan, in the same volume of Kentucky reports, there was a special verdict, and the court took time to consider, and some months afterwards ren-

dered judgment for plaintiff on the verdict. The motion for a new trial was filed within three days after judgment, but several months after verdict. To the argument that it was unreasonable to require the party to make a motion for a new trial before he knew what the judgment would be, the Court answered: "It is sufficient answer to this to say, '*lex ita scripta est.*'"

In the case above cited in *3 Pickering*, in considering the force of rules of court, Parker, C. J., speaking for the Court, says: "But a rule of the court thus authorized and made, has the force of law, and is binding upon the Court, as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. In the case before us, the plea was allowed to be filed on the fifth day of the term, although the rule allows but four days for that purpose. The circumstances were such as would justify that order of the court, if it had had power to pass it, but we are satisfied that no one judge of the Court of Common Pleas, or of this Court, has authority to dispense with rules deliberately made and promulgated on account of the hardship of any particular case, any more than he would have authority to dispense with any requisition of the legislature itself. The courts may rescind or repeal their rules, without doubt, or in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification, must be applied to all cases which come within it, until it is repealed by the authority which made it."

The plea referred to in the quotation was received by the Court of Common Pleas, but rejected by the Supreme Court.

The action of this Court in the cases above cited in sustaining rules of court is in accord with the principles stated by Chief Justice Parker in the foregoing opinion. And the other cases cited are all to the same effect.

It follows that neither the trial Court nor the General Term acquired jurisdiction of the motions for a new trial.

B.

The motions were addressed to the Circuit Court, and the General Term could have obtained jurisdiction thereof only by means of a certification thereof by the justice holding the Circuit to be heard in the General Term in the first instance, or by an appeal from the judgment of said Circuit Court overruling said motions.

Even if the motions for a new trial had been filed in time to have authorized the trial court to take jurisdiction thereof, the motions were not made in such form, nor were such proceedings taken thereon, as to give the general term jurisdiction thereof.

There are but two kinds or forms of motions for a new trial of which the general term has jurisdiction in the first instance, without some previous action thereon, or in relation thereto, by the trial court, and those are where the motion is made upon *a case or upon a bill of exceptions.* (See Sec. 806, R. S. U. S., relating to D. C., p. 2 of this brief. Also 60th rule, M. R., p. 9). Neither of the motions for a new trial in this case is of this character or form. On the contrary, one of said motions was made on exception, and the other on the grounds of insufficient evidence and excessive damages. These motions are provided for in Sec. 804 of said statutes, (See p. 2 of this brief) and the provision of the said 60th rule is in harmony with it. These motions, by the statute and the rule, are considered as addressed to the trial court, which may or may not take jurisdiction. But being addressed to the trial court, the general term cannot acquire jurisdiction without some action by the trial court. The judge presiding in the circuit court might certify such motions to the general term to be heard there in the first instance, or he might take jurisdiction thereof and overrule the same, and an appeal from that judgment to the general

term would give the latter jurisdiction. But if neither is done during the term at which the motions are made, they lapse with the term. (See Sec. 805 of said statute, p. 2 this brief, and last clause 63d rule, M. R., p. 10).

It will be seen that the language of Sec. 804 is that "such motion shall be *heard* at the same term at which the trial was had," and that of Sec. 805 is that "when such motion is *made* and *heard* * * * an appeal to the general term may be taken," so that it is requisite that the motion should be heard and decided by the trial court in order to confer jurisdiction on the general term. Of course, if the case goes to the general term, either on a certificate of the presiding justice, or on appeal, a bill of exceptions is to be settled in order to present the case there. But, though one or both should be settled, they are of no consequence unless the trial court, or the parties, or both, do the other requisite things to confer jurisdiction on the general term.

The difference between a motion for a new trial on "exceptions" and one on a "bill of exceptions" is clearly defined by the statutes and rules above refered to. The one is addressed to the justice who presided at the trial, for he alone, from his minutes, knows what the "*exceptions*" are. But when made upon "*bills of exceptions*" this form of expression alone addresses the motion to the general term, for formal bills of exceptions are unnecessary where the motion is addressed to the trial court; and if this motion be filed within the limited time, and formal bills of exceptions be made part of the record within the time required by law, this is all that is necessary to give the general term jurisdiction.

This distinction between "exceptions" and "bills of exceptions" is as clearly made in the decisions of this Court as in the statute and rules referred to.

Pomeroy's Lessee *vs.* Bank, 1 Wall., 598.

In this case it was said by the Court:

"Where exceptions are taken to the ruling of the court, in the course of a trial to the jury, such an entry is frequently made in the minutes of the case, or of the presiding justice, as evidence of the fact, and as a means of preserving the rights of the party in case the verdict should be against him, and he should desire to have the case re-examined in the appellate tribunal, but it was never supposed that such an entry could be of any benefit to the party unless he *seasonably* availed himself of the right to reduce the same to writing, and *took proper measures* to have the bill of exceptions sealed by the judge presiding at the trial, or, in other words, such an entry in the minutes can only be regarded as evidence of the right of the party *seasonably to demand a bill of exceptions.*"

* * * * * * *

"Unless an exception is reduced to writing and signed by the judge, it is not a *bill of exceptions* within the meaning of the statute authorizing it, and it does not become a part of the record." P. 600.

Congress in enacting the statute, and the Court below in making the rules, must be considered to have used the terms "exceptions" and "bills of exceptions" in their technical sense.

Bragman *vs.* Whitcomb, 124 Mass., 526.

In that case the Court says: "We are to consider the Legislature when dealing with subjects relating to courts and legal process, as speaking technically, unless from the statute itself it appears that they made use of words in a popular sense."

In the light of the statute, rules and decisions, the motion for a new trial on exceptions, as well as the one for insufficient evidence and excessive damages, must be considered as addressed to the trial court, and there having been no action thereon, the general term did not obtain, and could not have obtained, jurisdiction of this case by reason of said motions, even if they had been filed in time.

It may also be suggested that the plaintiff in error abandoned its motion on the ground of insufficient evidence and excessive damages, as no case was settled upon which it could be heard in general term.

C.

There was no appeal by the Plaintiff in error from the judgment of the Circuit Court.

Had the plaintiff in error appealed from the judgment of the circuit court upon the verdict, such appeal would have conferred jurisdiction on the general term to search the pleadings and other proceedings of record for error, but this was not done. No appeal was ever taken in the cause.

It is, therefore, respectfully submitted that this Court has no jurisdiction of the case.

The motion to strike out the bills of exceptions.

This motion is based upon the following state of the record:

Section 755 of the R. S. U. S., relating to D. C., authorizes the court below, by rule of court, to prescribe the times of holding the several terms of the court. It reads as follows:

"SEC. 755. The supreme court shall have power, by rule of court, to regulate the periods of holding its terms, as also the periods of the special terms, at which issues of fact triable by a jury or by the court are to be tried, and to fix the number of such terms, and to alter the same from time to time as public convenience may require."

In pursuance of this section the court passed a rule

providing for three terms of the circuit court annually, one to commence on the fourth Monday in January, another on the second Monday of May, and the third on the third Monday of October of each year. (Rule 2, M. R., p. 9).

This case was tried at the October term of the circuit court, 1885. Verdict and judgment were rendered on the 18th day of December, 1885. (Rec. pp. 7 and 8.) The October term expired by limitation and was adjourned without day on the 23rd day of January, 1886. (M. R., pp. 3 and 4.) The January term, 1886, commenced on the 25th day of January, and adjourned without day on the 8th day of May, 1886. (M. R., p. 7.) The May term commenced on the 10th day of May, 1886. (M. R., p. 8.) On the 23d day of January, 1886, the last day of the October term, an order was entered in this and two other cases, without notice to or the knowledge or consent of, the counsel for defendant in error, purporting to extend the term *indefinitely* for the settlement of bills of exceptions. After styling the cases the order is as follows:

"The Court orders this term of the court extended for the settlement of bills of exceptions and case, in the three above cases."

And on the same day the following order was entered, without being entitled in any case, to wit: "The court orders this term of the court extended for the settlement of bills of exceptions and case, in all cases tried this term in which exceptions have been taken and bill not settled."

"And thereupon the October term of this Court is adjourned without day, except as above." (M. R., pp. 3 and 4).

This cause having been improperly placed on the calendar of the general term, on the 24th day of April, 1886,

counsel for defendant in error filed a motion to dismiss it, which was submitted to the court on the 26th of that month but never passed upon by the court. (M. R., pp. 4 and 5). On the 8th day of May, 1886, the last day of the January term, that term was adjourned without day by Justice Hagner who presided during the term by assignment (M. R., pp. 6 and 7). On the same day Justice Cox, who presided during the October Term, and at the trial of this cause, and who was then sitting in general term by assignment, made an order at chambers entitled in this cause, purporting to extend the time for settling bills of exceptions in this case ten days (Record pp. 8 and 9). Counsel for defendant in error had no notice of this order. On the 18th day of May, 1886, the bills of exceptions were signed without the consent and against the protests of the counsel for defendant in error. (See protest in motion to dismiss, M. R., pp. 4 and 5). And on the same day, a memorandum was entered by the clerk in the docket of the court, purporting to file the bill of exceptions and make it a part of the record. This is not an order of the court, but only a memorandum made by the clerk. (M. R., p. 6). On the same day, Justice Hagner was holding the May Term of the circuit court, (M. R., p. 8).

Upon this state of the record it is contended that the alleged bills of exceptions are no part of the record, because—

First. They were not signed and made part of the record at the term at which the case was tried, nor within any period fixed therefor by order of the court made during said term.

Second. The order of court made on the 23d day of January, 1886, purporting to extend the term indefinitely for settling bills of exceptions is void.

Third. The order made by Justice Cox on the 8th day of May, 1886, purporting to further extend the time ten days is void.

Fourth. The said bills of exceptions were not made a part of the record by any order of the court.

FIRST.

The uniform rule of decision of this Court is that unless the bills of exceptions be signed during the term, or within a period fixed by order of Court made in term time, they form no part of the record.

Walton *vs.* United States, 9 Wheat., 657.
Bradstreet *vs.* Thomas, 4 Peters., 102.
Turner *vs.* Yeates, 16 How., 29.
Muller *vs.* Ehlers, 91 U. S., 249.
Coughlin *vs.* Dist. Col., 106 U. S., 7.
Hunnicut *vs.* Peyton, 102 U. S., 354.

In the case of *Bradstreet* vs. *Thomas* it is said:

"If the party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign *a reasonable time within which he may file it.* A practice to sign it after the term must be understood to be a matter of consent between the parties, unless the judge has made an express order in the term, allowing *such a period* to prepare it."

In the 16 Howard it is said:

"The convenient dispatch of business, in most cases, does not allow the preparation and signature of bills of exceptions during the progress of a trial. Their requisite certainty and accuracy can hardly be secured, if any considerable delay afterwards be permitted; and it is for each court in which cases are tried to secure, by its rules, that prompt attention to the subject necessary for the preservation of the actual occurrences on which the validity of the exception depends; and so to administer those rules that no artificial or imperfect case shall be presented here for adjudication."

In Coughlin *vs.* District of Columbia, *supra* where the bill of exceptions was signed after the term, the Court says:

"At that stage of the case the judge could not, without contravening the express provisions of the statutes and the decisions of this Court, present for consideration in an appellate court, questions of law which had not been made part of the record at the term at which his judgment was rendered."

The 65th rule of the court below provides, in accordance with these decisions, that

"The bill of exceptions must be settled before the close of the term, which may be *prolonged by adjournment* to prepare it." (M. R., p. 11.)

The 66th rule requires that notice in writing shall be given to the prevailing party of the proposed time of settling the bills of exceptions. No such notice was given in this case. In this connection an extract from the opinion of Chief Justice Waite in *Mutler* vs. *Ehlers* seems important. It is there said:

"It perhaps sufficiently appears from the bill of exceptions in this case, if it is to be taken as a part of the record, that the rulings complained of were excepted to in proper form at the time of the trial; but it does not appear that the bill of exceptions was filed, signed, tendered for signature, or even prepared, before the adjournment of the Court for the term at which the judgment was rendered. No notice was given to the plaintiff of any intention on the part of the defendants to ask for the allowance of a bill of exceptions, either during the term or after. No application was made to the Court for an extension of time for that purpose. No such extension of time was granted, and no consent given."

The facts recited in the above extract are identical with this case, if, as we contend, the orders purporting to extend the time are void.

The *necessity* of the notice required by the 66th rule is

adjudged in the following cases in Massachusetts, where there is a statutory requirement similar to this rule.

Doherty *vs.* Lincoln, 114 Mass., 362.
Connolly *vs.* Callahan, 121 Mass., 165.
Cooney *vs.* Bure, 123 Mass., 679.
Nye *vs*, Old Colony R. R. Co., 124 Mass., 241.

SECOND.

The order of the 23d of January, 1886, purporting to extend the term is void, because—

(*a*) **It does not limit the time within which the bills should be tendered.**

Rule 65, if not in terms, by necessary intendment, requires that if the term be extended for the purpose of signing bills of exceptions, it shall be for a definite period. Attention is invited to the similarity of the language of this rule to that of Chief Justice Marshall in the above extract from his opinion in *Bradstreet* vs. *Thomas.* It is to be presumed that the court below prescribed the rule in the light of the decisions of this Court upon the subject, and it should be construed in harmony with, and not in opposition to them.

Besides, the requirement of the rule is that the bills shall be settled before the close of the term, which may be *prolonged by adjournment*, in order to prepare it. The only way to prolong a term by adjournment is to "*adjourn*" to a specified day. The word "*adjournment*," as applied to courts and other deliberative bodies, has two well defined meanings, to wit, an adjournment *to a day certain*, and an adjournment *without day;* the *former* is adopted when it is desired to *preserve* or "*prolong*" the session or term, and the latter when it is intended or desired to close it. It necessarily follows that the only way to "*prolong*" the term is to adjourn to a *specified day*, and that an adjournment *without specifying a*

day when the term or session shall again meet for the purpose of continuing or finishing the business before it *is a closing of the term.*

1 Blackstone's Com., 186.
1 Bouvier Law Dictionary, Title Adjournment.
Anderson's Law Dictionary, Title Adjournment.
Century Dictionary, Title Adjournment.
Bank *vs.* Withers, 6 Wheat., 109.
Van Dyke *vs.* The State, 22 Ala., 60.
Garibaldi *vs.* Carroll, 33 Ark., 568.
Satstontall *vs.* Commissioners, 13 Ills., 705.
Hake *vs.* Strubel, 121 Ills., 321.

"An adjournment," says Blackstone, "is no more than a continuance of the session *from one day to another,* as the word itself signifies."

The language of the order in question does not purport to prolong the term *by adjournment,* as required by the rule, but only declares it "extended and prolonged" without adjourning to any specified time. Clearly such a declaration cannot have the effect to prolong the term. If it could have, how long is the term prolonged? One day, or ten years? If the order is valid for the first, it is for the last mentioned, or any other period. The defendants could have taken all the time they desired for the preparation of their bills of exceptions. They did take *five months.* By the final adjournment of the term for all other purposes, the court confessedly lost its power to make any other order in those causes except to settle and file the bills of exceptions. By Rule 66 the counsel for the defeated party is to take the initiative in settling the bills. The rules point out no method by which the court or the counsel of the opposing party can set them in motion. The only protection to the prevailing party is in the limit that has been fixed by the rules of this court, and by the universal practice of all courts. If the order in question has any validity it removes

that limit absolutely. Its effect, if valid, is to nullify the rule. That would seem to be a conclusive argument against it.

In Doherty *vs.* Lincoln, *et al.*, 114, Mass., 362, there was verdict for plaintiff October 10th, at September Term, 1873; the term was adjourned without day on October 17th, and this case continued *nisi*. The bill of exceptions signed by the defendant's attorney, and allowed by the presiding judge and by him endorsed, "may be filed and allowed of the last day of September term" was received and filed by the clerk after October 24th, as of October 17th. The statute of Massachusetts required the bill of exceptions to be reduced to writing, and filed with the clerk, and notice thereof given to the adverse party, and presented to the Court, before the adjournment without day of the term, and within three days after verdict, and provided that "for good cause shown a further time, not exceeding five days, unless by consent of the adverse party, may be allowed by the Court" and that "in all cases the adverse party shall have an opportunity to be heard concerning the allowance of such exceptions."

On motion in the supreme court to strike out the bill of exceptions, the Court says: "The date of filing the exceptions, and any order of the Court extending the time should appear on the docket."

* * * * * * *

"The provisions of these statutes * * * are intended for the benefit of the adverse party; and he is entitled to insist upon due proof of a strict compliance with them, unless he has done something to waive it." The bill of exception was struck out.

We find two cases only where any court has ever made an order purporting to extend the time indefinitely, to wit: the ones above cited in the 33 Arkansas and the 13th Illinois. In the first case the order was substantially like the

one in question, and the bills of exceptions were signed during the next succeeding term of the court. On motion they were struck out, the court holding that if such an order could have any effect at all it only extended the term at which it was made to the first day of the next succeeding term.

In the other case the order purported to authorize the signing of the bills of exceptions in *vacation*. They were signed in vacation after two terms had intervened. They were struck out, the court holding that the order must be construed as referring only to the first vacation after it was made, and remarking that "by any other construction, there might not be any *limitation* fixing the time for filing the exceptions."

Applying the rule in those cases to the present, and the term was not extended at all, as it was made on the 23d January, and the next succeeding term commenced on the 25th of the same month, and the intervening day was Sunday.

In *Sohn vs. Marion County, 73 Ind., 77*, a motion for a new trial was continued and overruled at next term after trial and a bill of exceptions then signed. A motion to strike out was sustained, Woods, J., saying: "It is not the policy of the law that the right to file bills of exceptions shall remain open *indefinitely*, but that the facts on which disputed rulings of the courts have been made shall be stated, together with the exception and grounds therefor, while fresh in the memory."

(*b*) **The order was made without notice to the counsel for the defendant in error.**

Final judgment was entered for defendant in error on the 18th day of December, 1885. The rule fixed the limit within which the bills of exceptions should be signed to be not later than the 23d January following, the last day that

term could sit by rule two, unless the time should be enlarged by special order of the court.

If such order was to be applied for, plaintiff was entitled to notice of the application. He was interested in the question whether the time should be extended. It was not a motion grantable of course, but in the discretion of the court, to be granted, if at all, after cause shown. This is in clear contemplation of the rules. The object for which he had sued out his original processes against defendant in the court below was then fully accomplished. He may be presumed to have been present in court with his process up to that time, and to have taken notice of all proceedings in the cause. But any proceeding after judgment, taken by the defendant, looking to the setting aside of, or avoiding said judgment, was a new proceeding in said cause, not covered by the original process, and the plaintiff was entitled to notice of the same.

Wade on Notice, secs. 1184 and 1205.
Hally *vs.* Williams, 8 Sm. & M., 487.
Dickey *vs.* Bruce, 21 Ills. Appls., 445.
Conley *vs.* Silverthorn, 9 Cal., 67.
Calderwood *vs.* Brooks, 28 Cal., 154.
Campbell *vs.* Jones, 41 Cal., 575.
Oglesby *vs.* Attrill, 12 Fed. R., 227.
B. R. & A. W. & M. Co. *vs.* Boles, 24 Cal., 356.

The order in question is in violation of the letter and intention of rules 65 and 66, and should be held void.

If the justice presiding in the circuit court may, under the last clause of rule 65, make an order without notice to the prevailing party, under which bills of exception may be signed at any *indefinite* time after the term, then, by the construction contended for, the last clause of the rule is made to nullify the first, and gives the rule, as a whole, a construction antagonistic to decisions of this Court.

THIRD.

The order made by Justice Cox on the 8th day of May, 1886, purporting to further extend the time ten days is void.

This order is found on pages 8 and 9 of the printed record. It was made on the last day of the January term, 1886, of the circuit court, the term immediately succeeding the one at which the case was tried. On the same day the said January term of the circuit court, being held by Justice Hagner, was adjourned without day. This order is therefore not the order of the court in any sense, but of a judge made at chambers. The object of the order was to affect a judgment entered at the October term, 1885, of the court, which expired by limitation and was adjourned without day on the 23d day of January, 1886. The judge was without power or jurisdiction at that time to make any order extending the time within which to file bills of exceptions, or in any manner affecting a judgment entered at a previous term of the court.

Bronson *vs.* Shoulter, 104 U. S., 410.
Coughlin *vs.* Dist. of Col., 106 U. S., 7.
Phillip *vs.* Negley, 117 U. S., 665.
United States *vs.* Piles, 130 U. S., 280.
B. R. & A. W. M. Co. *vs.* Boles, 24 Cal., 354.
Hake *vs.* Strubel, 121 Ills., 321.

In each of the cases cited in the 106 and 117 U. S., this court decided that neither the supreme court of the District of Columbia nor a judge thereof had any power, after the close of the term at which a final judgment was entered, to make any order setting it aside, or that might have that effect. In the case in vol. 106 a bill of exceptions signed after the final adjournment of the term was held to be void.

In the case cited above in 24 Cal., 354, an order was

made in term time staying judgment until a certain day, "in order that counsel may present and prepare his statement on motion for new trial." On the day preceding the one on which such time expired, defendant's counsel moved the court for three days further time to prepare and file the statement, and it was "ordered that said motion be, and the same is hereby, granted; and that the defendant's attorneys be, and they are hereby, allowed three days from the date hereof in which to file said statement." The statute required that the statement should be filed within five days after giving notice, or within such further time as the parties might agree, or the court or judge thereof might order. The court held that the first order was not in apt words to extend the time for filing the statement, and that the second order, although in language sufficient, was void, because made after the expiration of the five days.

In Hake *vs.* Strubel, *supra*, an order was made in term time giving sixty days for filing bills of exceptions. After the final adjournment of the term, and before the expiration of the sixty days, the judge who presided at the trial made an order further extending the time. The bills were signed after the expiration of the sixty days, but within the time limited by the second order. The court held them void and struck them out, remarking that "the conclusion seems irresistible that such an exercise of judicial power cannot be performed out of term, or *beyond a time* agreed or allowed of record, in the absence of a statute expressly so providing."

If the judge cannot, after the term, sign a bill of exceptions, except in pursuance of and within a time fixed by an order of record during term, it follows that he cannot, after the term, make any order extending the time, and the authority, if any, to sign the bills in this case, must be found in the order made on the 23d of January, 1886, at the trial term. If that order did not authorize the signing of the

bills, as hereinbefore contended, then they were signed without power on the part of the judge, and are no part of the record. Indeed, the fact that counsel for plaintiff in error applied for the order made by the judge on the 8th day of May, 1886, is an indication that they did not understand that the order of January 23d would authorize the signing at any indefinite time, but that there must be some limit to it; and the limit that seems to have occurred to them is the last day of the term next succeeding the trial term, for it was on that day they procured the order of further extension to be made. That order being void, the bills were signed after the limit which counsel for plaintiffs in error have themselves fixed, for the bills were not signed until the 18th day of May, 1886, after the expiration of the term next succeeding the trial term, and while the *second* succeeding term was in progress. (M. R., pp. 6, 7 and 8.)

FOURTH.

The filing of the bills of exceptions was not noted in the minutes of the Court, and they have never been made a part of the record by any order of Court.

Rule 68 (M. R., p. 12) as well as the decisions of this court, require that the fact of the settling and filing of the bill of exceptions, and that it is made a part of the record, shall be noted on the minutes of the court. This is the only way in which the bills can be made part of the record. The declaration in the bill itself cannot have that effect. It must be done by an order, entered by direction and authority of the judge, in the minutes of the court, during the trial term, or within such time thereafter as may be fixed by order entered during the term.

This was not done in this case. On the 18th day of May, 1886, the day the bills were signed, the clerk made a memorandum in the court docket of the filing, (M. R., p. 6). But this is neither an order of the court or the judge. It is not a proceeding in court, but in the clerk's office. It does not purport to be a proceeding in the court. If the order purporting to extend the term was of any force, the trial term stood adjourned for the purpose of signing and filing these bills of exceptions, and the adjourned term should have been opened for that purpose in the presence of the judge, and the order made and entered of record in the minutes and proceedings of the court, and this should have been entered of record like any other proceeding in court. A failure to do this precludes the consideration of the bills, even if all the other proceedings had been regular.

BRIEF ON THE MERITS

IN BEHALF OF

DEFENDANT IN ERROR.

BRIEF ON THE MERITS IN BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Nature of the Action.

This is an action on the case for a personal injury. The trial resulted in a verdict and judgment for plaintiff in the court below in the sum of $6,195.00.

Nature of the Injury.

The injury complained of was the loss of the left arm near the shoulder. It occurred on the 5th day of February, 1883, while the plaintiff below was attempting to place a belt on a pulley which was in motion in the machine and blacksmith shop of the defendant below. The belt was thrown off the pulley towards and against plaintiff, and caught upon a projecting screw which fastened the pulley to the shaft, and the belt wound around the shaft, binding plaintiff's arm down to it, breaking and crushing it, and rendering immediate amputation necessary.

The Defendant's Machinery.

The defendant owned and operated machine and car shops, where it manufactured and repaired the cars used by it, and also a mill for grinding the feed for the horses. These were all carried on in one building, known as the

car-shops. In the same building, but in a separate room, was a blacksmith shop, where the blacksmith's work in connection with the business was done. All the machinery used in the building was propelled by one steam engine. The engine-room adjoined the blacksmith shop, there being a partition wall between the two rooms, through which there is a door. The main shaft was in the engine-room, from which motion and power were communicated to the various machines in the building, by means of belts running on pulleys fixed on the main shaft, and extending to and running on pulleys fixed on various counter-shafts. The blasts of air used for the fires in the forges in the blacksmith shop were created by a revolving fan near the ground, a short distance from the forges, enclosed so that the current of air produced by its revolutions was forced into a tube connected with the enclosure of the fan, and running under ground to the fires in the forges. There was a valve in the tube immediately in the rear of the forge, by means of which the current of air could be shut off and turned on at pleasure, while the fan was in motion. In the blacksmith shop there was a counter-shaft about twelve feet from the ground, propelled by means of a belt running on a pulley fixed to the main-shaft in the engine room, passing through a hole made for the purpose in the partition wall, and running on a pulley fixed on the counter-shaft in the blacksmith shop. The fan was propelled by means of a belt running on a pulley fixed to the said counter-shaft, extending to and running on a pulley fixed to the fan, which was nearly under the counter-shaft. *It was this last-named belt that plaintiff was attempting to put on when he was injured, and which was indispensable in order that he might perform the duties required of him at his forge.* The fan propelled by it fed two forges, or fires. There was another fan in the shop run in the same way by a separate belt running on another fixed pulley on the same counter-shaft, and also a drill press run by a separate belt and pulley,

making three machines run by the same counter-shaft. The men employed, and the work done in these shops, were, at the time of the accident, under the general direction and control of a foreman named Hawk.

The Plaintiff's Employment.

The plaintiff was employed as and was doing the work of a blacksmith when injured. He went into the employ of the defendant in the spring of 1881.

He is a blacksmith by trade and had always worked at the same up to the time of the accident, and was working at his trade in Washington when the president of plaintiff sent for him to do blacksmith work for defendant. He went accordingly and reported for duty at the blacksmith shop, where he was met by Hawk, the foreman, who inquired what wages he wanted, in reply to which he said he would expect the highest wages paid by the company to any man in that line, and was told by Hawk to go to work in the blacksmith shop, which he did. There was no more formal contract between plaintiff and defendant than as above stated. There was another blacksmith named Eckrit at work in the shop at the time, and who remained about three months after plaintiff went there. The forges or fires at which they worked were near together, and were both fed by the same fan. Their work was to make and repair the various irons used in and about the cars.

The Mode of Running the Machinery.

It was customary with the defendant to run the engine and some portions of the machinery, occasionally in the evening, for the purpose of grinding feed for the horses, after work was stopped in other parts of the shop. This occurred about once per week, and on such occasions the belt in question was thrown off from the pulley on the counter-shaft to save the running of the fan when not needed. It re-

mained off over night and had to be put on the following morning when work commenced in the blacksmith shop. the first occasion it was off after plaintiff went there Eckrit put it on in the morning when they commenced work as he had done before, and continued to do as long as he remained. The other belts in the blacksmith shop were also generally thrown off on the same occasions when the one in question was, and they were generally put on by the men who worked at those machines, or by the engineer, except when any of the belts were taken off for repair, then they were put on by Moore, the miller, employed in the mill—a department of the shops—who repaired them. Plaintiff saw this business go on in this manner for three months or more, while Eckrit remained, and always saw him and the others put the belts on when the machinery was in motion, and the pulleys revolving.

The Plaintiff Ignorant of Machinery and the Danger.

The plaintiff had no experience with or knowledge of machinery or belts, and had never attempted to put one on, nor had he ever seen it done until after he went to work for defendant.. He never had but once before worked at a forge where the blast was supplied by a fan run by machinery, and in that case the fan was outside the building, and he had nothing to do with it.

When Eckrit left, plaintiff *was directed by Hawk, the foreman, to take his place*, which he did. The first time he found the belt off after Eckrit left, plaintiff asked the engineer who would put it on, and the engineer asked him if he could not, to which he responded that he supposed so, and did it, and continued to put it on afterwards whenever he found it off, and it was necessary to have it on to enable him to do his work, until he was injured, except when it was taken off for repairs, when Moore, who repaired it, put it on. On several occasions the Superintendent of the Company, and

Hawk, the foreman, saw him put it on, and knew that he did it, and never told him not to do so, *nor was he informed by them or any one else that it was dangerous to do so, and he testified that he did not know that there was any danger in doing so.* During the same time the other belts in the blacksmith shop, when off, were put on by the men respectively working at the machine run by them, or by Cline, the engineer. The belts were not thrown off by the men who worked in the blacksmith shop, but by some one else after they left.

The Accident.

The accident occurred on Monday morning. Saturday night when plaintiff left the shop the belt was on and the fan in motion. When he returned Monday morning he found he belt off, and the machinery running. He attempted to put it on as usual, going up the ladder some twelve feet for the purpose, but the belt ran off on the opposite side of the pulley from him. He had never had any difficulty in putting the belt on before. He called the engineer's attention to it, who went up and put it on, but it ran off on the opposite side as before. The engineer then told plaintiff to go up and put it on while he slowed up the engine, and plaintiff, after waiting from half a minute to a minute for the machinery to be slowed up, and after it had slacked somewhat, again went up the ladder and attempted to put the belt on, when the injury occurred as before stated.

The Belt Repaired.

On Friday previous to the accident the belt had been taken off and repaired and replaced by Moore, and this was the first time it was off afterwards.

The pulley fixed on the counter-shaft upon which the belt ran was about 30 inches in diameter, and the counter-shaft was about 3 inches in diameter. In putting on the belt the person doing so had to go up a ladder, provided

and kept there by defendant. The ladder leaned against the wall and the person going up it had his face towards the wall and his back to the counter-shaft, and nearly or quite touching it. In putting the belt on he would turn quartering to the pulley.

The Machinery Defective and Dangerous.

It was shown by the testimony of skilled machinists that it is dangerous for any person, and especially one not experienced to put belts upon moving pulleys by hand, and that doing so should be avoided as much as possible. That there had been in common and general use for twenty-five or thirty years prior to the accident a contrivance known as a loose pulley running on the counter-shaft by the side of the fixed pulley, and when it is desired to stop any particular machine while the main-shaft is in motion, it is done by shifting the belt from the fast to the loose pulley by means of a shifter or lever fixed on a pivot to the ceiling above which is easily worked by hand in shifting the belt from one pulley to the other, without touching the belt with the hand, and in this way any machine may be started and stopped at pleasure, and without any danger whatever to the person operating the lever. That such a contrivance is very simple and cheap; and the defendant used it in other parts of the shop, but did not have any in the blacksmith shop. That the loose pulley and lever is used in all well planned and regulated shops.

The Plaintiff Ignorant that there was such a Device.

The plaintiff being entirely unused to machinery, did not know that there was such a contrivance and had never seen or heard of one until after his injury, and did not know that there was any other way of removing the belt from, or replacing it on the fixed pulley than to do it by hand, and the officers and agents of defendant did not nor did anyone

in or about the shops inform the plaintiff, either that there was any such contrivance for shifting the belt, or that there was danger in doing it by hand.

The Defendant's Superintendent incompetent.

The evidence also shows that Hawk, the foreman of the shops, and under whose directions all operations there were carried on, and who had charge of the machinery, was not a skilled machinist, nor at all acquainted with it, but was only a carpenter, and had never been otherwise employed, and was incompetent to have charge of machinery and persons operating it.

The Exceptions.

At the close of the plaintiff's evidence the defendant moved the court to instruct the jury to return a verdict for the defendant, which motion the court overruled, and the defendant excepted . (Record, p. 15.) At the close of the defendant's evidence this motion was renewed and again overruled. (Record, p. 40.) The defendant then presented twenty requests for instructions, three of which were given in the language presented; (Record, pp. 40-1), ten were given with slight verbal alterations, and seven were denied. (Record, pp. 41-9). The court also gave one instruction of its own motion. (Record, p. 41). To the denial and modification of requests and the voluntary instruction, the defendant's counsel excepted. The record, therefore, presents three principal questions, to wit:

First. Was there sufficient evidence tending to prove negligence on the part of the defendant to require the submission of the case to the jury?

Second. Was the evidence of contributory negligence such as to leave that a question of law or of fact?

Third. Did the court, in submitting the case to the jury, correctly state the law?

FIRST.

Negligence of Defendant.

The evidence tends to establish negligence on the part of defendant in four particulars, to wit:

(*a*) *In providing defective or unsafe machinery.*

(*b*) *In permitting the machinery to be out of repair.*

(*c*) *In employing an incompetent foreman to have charge of the machinery and workmen.*

(*d*) *In failing to notify the plaintiff of the dangerous condition of the machinery.*

The proof of the first element of negligence above mentioned is clear, and there is substantially no conflict in the evidence upon that point. That it is dangerous to place a belt upon a moving pulley by hand; that it is safe and convenient to do it by means of a loose pulley and shifter; that such device had been in common and general use for more than twenty-five years prior to this accident; that it was in use in all parts of the defendant's establishment except the blacksmith shop, at that time, are facts testified to not only by four witnesses produced by plaintiff, but also by several on behalf of defendant, and was contradicted by no one. (Record, pp. 13, 14 and 15. Evidence of Springmann, Thompson, Pettit and Randolph. Also evidence of Noyes, for defendant, pp. 16 and 17).

The evidence is also undisputed that this belt was removed, repaired and replaced by the man employed for that purpose by defendant, on Friday before the accident occurred on Monday morning, and that plaintiff was injured in attempting to put the belt on the first time it had been removed after it was repaired, and that in repairing a piece had been cut out of the belt, thereby shortening it. (Record, pp. 12, 20–'1.) The clear inference which the jury might have drawn is, that the belt was too much shortened in repairing (and this is the evidence on behalf of defendant, Record, p. 16), which caused it to fly off when plaintiff attempted to put it on a revolving pulley.

Hawk, the foreman in charge of the machinery and workmen, when on the stand as a witness for defendant, testified that he never had any experience with machinery, and no special knowledge of it. From this fact, it would have been competent for the jury to have found that he was incompetent, and that the accident occurred by reason thereof.

Plaintiff testified that he never had any experience with machinery; never had seen a belt put on a pully until he saw it done in defendant's shop, and never attempted to do it himself until after he had seen others do it there; that he had no knowledge that it was dangerous to do so by hand, or that there was any other mode of doing it, and that no one gave him any warning of the danger or instructions about the belt. (Record, pp. 12, 13 and 20–'1.) No one conatradicts his statements in this regard, and there is no evidence tending to show that he had any other knowledge than his short experience in the shop gave him. No notice was given plaintiff that the belt had been made too tight by repairing.

Considering the tendency of this evidence (though it is not stated above as strong as the record would justify), in the light of the adjudications of this Court upon the duty of the employer to furnish the employee with proper and reasonably safe machinery, and to acquaint him with defects and dangers therein, and in the use thereof, unknown to him, it is not perceived how the court could have done otherwise than to submit the case to the jury. Its duty in that regard seems to be conclusively stated in the following extract from the opinion of the learned judge who announced the judgment of the general term in this case:

"Under these circumstances, it was quite impossible that the court could take away from the jury the inquiry into the facts, to wit: the sufficiency of the machinery for the purpose, and the knowledge on the part of the plaintiff, of the dangers connected with it, and of the performance of

the duty of the employer to apprise him of whatever dangers might be latent, or even patent, but beyond the reach of his observation with respect to the employment which he undertook."

5 Mackey, 156.

The employer is liable to the employee for any accident happening, without fault of the latter, through the defective or dangerous condition of machinery, unknown to the employee, arising from improper construction or want of proper attention and repair, and any person charged with providing or maintaining the same for the employer is not a fellow-servant of the employee using such machinery in such sense as to prevent a recovery by the latter for injuries received in consequence of such defects.

Hough *vs.* Railway Company, 100 U. S., 213.

N. P. R. R. Co. *vs.* Herbert, 116 U. S., 642.

In the case in the 100 U. S., this Court, quoting with approval from another case, says: "The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep its machinery in safe condition."

In *R. R. Co.* vs. *Herbert, supra,* it is said by this Court that:

"The same considerations which render him (that is the employer) rssponsible in such cases for the safe transportation of passengers and property, should also impose upon him an equal responsibility to his employees, so far as their safety depends upon the character and condition of the machinery and appliances used in the transportation. Where the employee is not guilty of contributory negligence, no irresponsibility should be admitted for an injury to him caused by the defective condition ot the machinery and instruments with which he is required to work, except it could not have been known or guarded against by proper care and vigilance on the part of his employer."

* * * * * * *

Quoting, with approval, from a case in California, the opinion proceeds:

"In Beeson *vs.* Green Mountain Gold Mining Co., 57 Cal., 20, the defendant, a corporation engaged in quartz mining, appointed a superintendent to supervise and manage its mining operations, with authority to employ and discharge laborers at the mine. One of the laborers thus engaged lost his life in a fire, which originated from a defective pipe, put up by a tinner under the supervision of the superintendent, and connected with the engine used to raise ore and take water from the mine. It did not appear that the deceased knew or had reason to know of the defect. In an action by his widow for damages in consequence of his death, it was held against the contention of the company, that the superintendent was not a fellow-employee of the deceased in the sense indicated by the statute; that, for the purposes of managing the business and determining what machinery should be used and how placed, he was the representative of the company, and that the deceased was not bound to know whether a defect existed in the machinery and appliances not within his view, but had a right to rely upon the implied agreement of the company that the pipe was properly placed and constructed. It was also held that the tinner, in performing his share of the work, was not a fellow-servant of the deceased; that, as his work was done under the direction and supervision of the superintendent, it was the same as if done by the superintendent in person."

It was the duty of the defendant to inform plaintiff of the defect in the machinery, and the danger of putting on the belt.

"The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and are injured in consequence. Such cases occur most frequently in the employment of infants. * * * * * *

"This is not a rule which in its application is confined exclusively to infants; the principle is a general one which requires good faith and reasonable prudence on the part

of the employer, under the special circumstances of the particular case; of which infancy, if it exists, may be a very important one, but possibly not more so than some others."

Cooley on torts, p. 553-4-5.
Wheeler *vs.* Mason M'f'g. Co., 135 Mass., 294.
Chicago &c. R. R. Co. *vs.* Bayfield, 37 Mich.

In the case in 37 Michigan the direction given the jury is substantially as in the case at bar. (See pp. 208-9.)

Dowling *vs.* Allen, 73 Mo., 13.
Strahlendorf *vs.* Rosenthal, 30 Wis., 674.

"The master may also be negligent in commanding the servant to go into exceptionally dangerous places, or to subject himself to risks which, though he may be aware of the danger, are not such as he had reason to expect, or to consider as being within the employment."

Cooley on torts, p. 555.
Chicago, &c., R. R. Co. *vs.* Bayfield, 37 Mich., 210-11, 12.
Patterson *vs.* Pittsburgh R. R. Co., 16 Pa. St., 389.
Coombs *vs.* N. B. Co., 102 Mass., 583.
R. R. Co. *vs.* Fort, 17 Wall., 555.

SECOND.

The question of whether the plaintiff was guilty of contributory negligence was one of fact for the jury.

It has been contended by the counsel for the railroad company that the danger in putting on the belt was so patent that any man of ordinary intelligence would have observed it at once, and that in undertaking to put it on he assumed all risks, and as matter of law is guilty of con-

tributory negligence. But it is to be observed that the defect in the machinery which resulted in his injury was three-fold, *i. e.*, the want of the loose pulley and shifter, which made it necessary to handle the belt by hand; the making of the belt too tight by the recent repairs, and the projecting screw. He was ignorant that there was any such device as above-mentioned for the handling of the belt, or that the belt had been shortened by mending until after the accident, nor had his attention been called to the projecting screw. No one had informed him of either. He had seen the man Eckrit who preceded him at the forge, and who was there when he went there, put it on while the machinery was in motion, as also the man Moore who repaired it. He could of course see that it would be dangerous to put his hand or arm where it would be caught in the revolving pulley, or between it and the belt. He was not, however, injured in either of these ways, but by the belt flying off when he attempted to put it on, and catching on the screw which fastened the pulley to the shaft, and catching and binding his arm down to it.

The plaintiff was clearly entitled to have the case submitted to the jury.

Hough *vs.* R. R. Co., 100 U. S., 225.
N. P. R. Co. *vs.* Herbert, 116 U. S., 655-6.
Phenix Ins. *vs.* Doster, 106 U. S., 32.
Kane *vs.* Northern Cent. R'w'y, 128 U. S,
Jones *vs.* East Tenn. &c. R. R., 128 U. S.
Coombs *vs.* N. B. Cordage Co., 102 Mass., 585.
Snow *vs.* Housatonic R. R. Co., 8 Allen, 441.
Walsh *vs.* Peet Valve Co., 110 Mass., 25.
Swoboda *vs.* Ward, 40 Mich., 420-424.
Keenan *vs.* R. R. Co., 103 Pa. St., 124.

The two cases cited in the 128 U. S. seem to be conclusive upon this point.

In Kane *vs.* Northern Central Railway, the plaintiff was

injured in consequence of a defective car of which he had previous knowledge, but which he testified he had forgotten. The court below held this to be evidence of contributory negligence in law, and directed a verdict for defendant. This court reversed that judgment, and directed the case to be submitted to a jury, remarking: "But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion."

In the case of Jones *vs.* East Tenn. &c. R. R. Co., the plaintiff, an employee of the defendant, was injured by being struck by an engine of the defendant. The evidence tended to show negligence on the part of the defendant in running the engine too fast, and also that the plaintiff was negligent in not carefully observing the train, but he testified that he could not see in the direction from which the train was approaching him because of a car on a side track, and that no warning was given of the approaching train. The court below took the case from the jury on the ground that defendant was in law guilty of contributory negligence. But this court, in reversing that judgment, said: "But we think that these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

The rule is that where different conclusions may properly be drawn from the facts and circumstances in proof, the question of

THIRD.

There was no error in the instructions given the jury, nor any in the refusal of the court to instruct as requested by counsel for plaintiff in error.

There is but one exception to the instructions given, and that one was given by the court on its own motion. (Record, p. 41.) Three others were given at the request of the attorneys for plaintiff in error, and in the language in which they were presented. The other exceptions relate to the refusal of the court to instruct in the exact language of counsel. Many of the instructions asked were given with slight modifications, and others refused. It will be seen that the rejected prayers cover the same general grounds as those given with modifications, and that *the three prayers granted at the request of counsel for the plaintiff in error, and the one given voluntarily by the court cover the whole law of the case.* The court having refused to take the case from the jury, the effort seemed to be to have it give them a binding instruction, or so confuse them as to render a verdict impossible. The judge who delivered the opinion of the court below in speaking of this feature of the case, uses the following language:

"After the close of the testimony there were eighteen instructions applied for, but it is not the duty of this court to go into a minute criticism upon them all. It is sufficient if we find that although some of the propositions which, standing by themselves, may be good law, were rejected, there was enough given to the jury to cover all the law of the case. This was not only all that the party had a right to demand, but all that the court should have done; and it is no ground of error to reject a good and appropriate

prayer, provided the law of that prayer be already sufficiently presented to the jury in other parts of the instructions which may be given.

"And we may be allowed to say here, in view of the multiplicity of the prayers and exceptions taken in this case, that it is a serious vice to allow a greater number of instructions to be given to a jury about these matters of diligence on the one hand and negligence on the other, than are necessary for a full understanding of the case. It tends to darken rather than enlighten the judgment of the jury.

"The only questions to be presented for the consideration of the jury in this case were, in the first place, whether the machinery was at all defective; if defective, whether the plaintiff had knowledge of it and whether the employer had reason to suppose that he had knowledge of it; and lastly, whether there was contributory negligence by the plaintiff, assuming that there was a defect in the machinery which ought to have been obviated. With regard to all those matters the court granted the first, second and third prayers which were presented by the defendant and which contained all the law to which the defendant was fairly entitled upon the whole evidence. The fourth instruction, which was voluntarily given by the court, superadded to the others, was the subject of criticism on the part of the defendant. But when that prayer comes to be considered, so far from its being obnoxious to the objection that it takes away any right from the defendant, it is apparent that it gives it perhaps more than it was entitled to at the hands of the court."

* * * * * * *

"Under all the circumstances of the case, the court is of the opinion that no error was committed, to the detriment of the defendant in this case; but if there was any it was

in too great an indulgence and relaxation of the law in its favor."

See 5 Mackey, 156; 160.

It is the established doctrine of this Court that it is not error to reject a request which properly propounds the law, where the jury has already been correctly instructed upon the whole law of the case.

Taber *vs.* Cooper, 7 Wal., 565; 571.

R. R. Co., *vs.* Horst, 93 U. S., 291; 295.

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